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Methods of Estimating Depreciation in Valuation of Public Utilities for Rate Making Purposes *

EVERY property engaged in the public service will be composed of property which does not depreciate, land for example, in the normal instance, and property which does depreciate in value through physical deterioration or functional changes. I cannot do better than quote Mr. Adams,[1]

> " 'Depreciation' means the shrinkage in value of properties because of deterioration from use and because of enforced abandonment by reason of functional changes and obsolescence. For purposes of illustration, an iron pipe laid underground, through a gradual process of physical deterioration fails in the course of a period of years and must be replaced by a new one. For purposes of illustrating what is meant by 'functional depreciation' the growth of a city frequently makes necessary changes in the method of distributing the water, calling for the abandonment of pumping stations on certain sites and the construction of others elsewhere. The pumping station of this particular property located in 1904

* The opinion of H. M. Wright, Esq., Standing Master in Chancery, in his report in the case of Contra Costa Water Company v. City of Oakland, pending in the District Court of the United States for the Northern District of California, Second District, discusses many questions of interest respecting the basic principles of rate regulation. Through the courtesy of Mr. Wright we are enabled to print a portion of his opinion dealing with the matter of depreciation.

[1] Quoting from the transcript in the case (p. 99).

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and 1905 at the Broadway Reservoir is an illustration in point. This pumping station was built subsequent to 1900, was in use in 1904 and 1905, and two years thereafter it was entirely abandoned and another one built in its place on another site. As an example of depreciation through obsolescence one may cite pumping machinery, which, though it may after many years of use, be in excellent working condition, may have become obsolete and no longer economical of use, leading to its enforced abandonment and replacement by machinery of greater capacity or of better economy in steam consumption. In speaking of depreciation one should carefully distinguish between the two general classes ordinarily designated as matured and unmatured depreciation. Matured depreciation relates to structures that have wholly failed and must be replaced or abandoned, or to properties which have entirely failed through functional changes or obsolescence. Unmatured depreciation is shrinkage in value of properties and structures not new, but still serviceable in use and which will in the course of time have to be abandoned or renewed. Matured depreciation represents total shrinkage in value because of the structures' having served out the entire period of their usefulness. Unmatured depreciation represents shrinkage in the value of structures because they have partially served out their total period of usefulness."

It obviously follows that if a water works is to have a fair return for its service to the community, the rates charged must afford a revenue from operation sufficient to make good this inevitable depreciation in value of certain of its elements, as well as other costs of operation, plus the profit which induces the operation. Depreciation is thus, for any future period, a problem in cost accounting. That this apparent fact, now generally admitted, was not always understood is shown by the decisions of the Supreme Court of California in Redlands Water Company v. Redlands,[2] and San Diego Water Company v. San Diego,[3] where an annual return in the rates for depreciation was denied. In the latter case Mr. Justice Garoutte said:[4]

"Such a thing is all wrong, for it results in the consumers of water buying the plant and paying for it in annual installments."

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[2] (1898), 121 Cal. 312, 53 Pac. 791.
[3] (1897), 118 Cal. 556, 50 Pac. 633.
[4] Id. p. 583.

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On this basis, the owner of a plant costing $100,000 with an assumed life of twenty years would receive income on his investment for the life of the plant, and would then be out his investment save for its scrap value. This would be like satisfying a loan by paying interest on it.

It is only within the last few years that methods of accounting for depreciation in relation to the problem of rate fixing have been the subject of thorough study by those most competent to speak. The impetus to that study seems to have been the decision in Knoxville v. Knoxville Water Company.[5] I am assured by counsel that in this case certain opposing theories have for the first time been presented for judicial determination. Certainly the exposition of these questions in the record, both by the witnesses, engineers of high standing and fitness, and by counsel has been most exhaustive and able.

The law on this question may be considered as fairly well settled by the decision in Knoxville v. Knoxville Water Company[6]. It would be interesting to consider that case at some length with reference to the specific facts there disclosed, and to certain possible limitations on the generally received doctrine of the case. It is not here necessary. That case may be considered to stand for the following propositions, namely: That the depreciated value of public service property is the proper rating base for determining fair return; that the rate-payers must pay for the depreciation of public service property; and that such a company is entitled to earn its depreciation annually as the depreciation accrues.

In the Minnesota Rate Cases,[7] the court disapproved the master's action in finding that the depreciation which had in fact happened was more than offset by appreciation, and thus adopting the cost of reproduction new as his rating base. The property in question was a railroad, and here, as in the water works of the Knoxville case, the court held that the extent of existing depreciation should be shown and deducted, saying:

> "It must be remembered that we are concerned with a charge of confiscation of property by the denial of a fair return for its use; and to determine the truth of the charge

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[5] (1909), 212 U. S. 1, 53 L. Ed. 371, 29 Sup. Ct. Rep. 148.
[6] Supra, n. 5.
[7] (1912), 230 U. S. 352, 456, 57 L. Ed. 1511, 33 Sup. Ct. Rep. 729.

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there is sought to be ascertained the present value of the property."

In other words, the Supreme Court identifies value for rate fixing purposes with value in exchange, the value that would be be paid for the property upon sale or condemnation. In such cases loss of condition or diminished life would inevitably be reflected in a diminished value.

In approaching the problem before us it is necessary to bear in mind that the question of depreciation presents itself in two aspects. The one, its financial aspect, concerns the method of amortizing the value of a structure, of fulfilling the ratepayers' duty of paying for wasting value as it progresses. It is discussed primarily in terms of money, and rates of interest for the use of money. It is a problem of bookkeeping, of cost accounting, applying mathematical principles and methods. It is most appropriate in considering the problem of depreciation for the future life of a new plant or, perhaps, the remaining life of particular structures of an old plant. The other aspect has to do with the *facts* of depreciation, for example, the percentage of present condition and therefore the present remaining value, the rate at which as a fact, depreciation has gone on, the rate at which it may be expected to go on hereafter, and like concepts. We are here considering a plant in the middle of the lives of its units. Now, if under methods of accounting agreed upon by the company and the city, books had been kept to show a depreciation account, the only problem to arise would be as to whether the basis of cost accounting should be changed in view of money costs, interest rates and the like, in the light of actual replacement requirements. Here no depreciation account has been kept and no reserve for accruing but unmatured depreciation laid by. In ratefixing proceedings under the Knoxville decision as generally received, and certainly in the event of sale, the company must stand this loss.

"It is obvious, however, from what has been stated that we must first understand depreciation from the theoretical standpoint,—the different methods of amortization of capital. I shall consider four such methods which have been discussed in the evidence in this case, viz:—the replacement method, two curve line methods, founded upon the principle of the sinking-fund, which graphically depicted forms a convex curve, and the straight line method so-called from its graphic form.

In the discussion and in the illustrative tables which follow it

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will be assumed that the plant is a normal plant as regards its cost and its relation to the community demand; that it consists of a single structure whose original cost was $100,000, and whose life is ten years; that original cost represents value new, both at the time of installation and at the time of replacement. For illustration, we will assume that a proper investment return throughout the life of the plant sufficient to induce the building and operation of the plant is six per cent.

In this simple situation it must be admitted by everyone that the owner of the plant must receive as his reward six per cent per annum throughout the period, a total of $60,000, and must also at the end of the period have received enough from the rates charged to keep his investment intact, that is, to make good the waste of depreciation. In other words, his total return on account of interest on investment and depreciation combined must reach the sum of $160,000. This may be effected in several ways.

Another and underlying principle which must not be lost sight of is that in any business situation money is always to be deemed as earning interest at a compound rate for the benefit of its owner, the one in whose hands it is at any time.

As stated before, for the purpose of this discussion I assume that original cost of any unit of plant is the measure of its capital value, and that replacement will be made at the same cost.

Replacement Method.

By this method, capital lost by depreciation is returned when depreciation matures and only then. When the unit reaches the end of its life and is renewed or abandoned, an allowance is made in costs for that year of the full value of the unit. There is no annual return to offset depreciation. It is unnecessary to consider the estimated life of the plant. The percentage rate of return to the investor must obviously be based on undepreciated value; otherwise capital is currently used up without income return, and confiscation results. This will be clear from the following table.[8]

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[8] Column 4, in table 1, might better be entitled, Rating Base. It is the amount of capital unamortized; but as depreciation progresses it of course does not represent present value of capital, the value in exchange.

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TABLE 1.

Replacement Method.

Original cost equals value new, equals replacement value, $100,000; life of ten years; rate of return to the investor six per cent throughout.

1 Age in years.	2 Capital paid in.	3 Depreciation returned.	4 Capital remaining, residual or present value.	5 Annual return on capital remaining.	6 Total of combined returns by year.
1	$100,000	0	$100,000	$6,000	$6,000
2	0	0	100,000	6,000	6,000
3	0	0	100,000	6,000	6,000
4	0	0	100,000	6,000	6,000
5	0	0	100,000	6,000	6,000
6	0	0	100,000	6,000	6,000
7	0	0	100,000	6,000	6,000
8	0	0	100,000	6,000	6,000
9	0	0	100,000	6,000	6,000
10	0	$100,000	100,000	6,000	106,000
11	0	0	100,000	6,000	6,000
12	0	0	100,000	6,000	6,000

If capital remaining were valued each year as depreciated, say, for example, at an equal amount of $10,000 a year, the value of plant during the tenth year would be $10,000, and return that year $600; dividends would be paid at one-tenth the proper rate, and it is seen that a progressive confiscation of capital has resulted.

This method does not conform to the Knoxville decision supra, in that it necessarily bases return on undepreciated value, or original investment, and in that it does not return depreciation in annual installments. Its advantage is that it is a simple method easily determined. If as regards any particular public service property it should appear as a fact that it was composed of a great number of depreciating items, having comparatively short lives, and of comparatively small cost, installed at different times, it might well come about as a matter of history and experience that replacement requirements each year would be approximately the same, or would reach such a total figure as combined with the investment return would make the combined return for replacement and investment approximately equal each year,—the ideal condition. It may be conceived, for example, that this might apply in the case of a railroad. If such were the case it would be a just and proper method, both to the company and to the rate-payer. In any case where such conditions do not obtain, especially as seen in the table, the method has practical disadvantages that are obvious. Compliance with the method requires an enormous

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advance in rates during the tenth year, which would work great hardship on the consumers of that year, to the advantage of the consumers of other years. From the standpoint of the owner of the plant also it involves possible, indeed, probable, injustice in that the extraordinary rate, if imposed by the rate-making body, would probably be impossible of collection; and, furthermore, since no legislative body may bind its successors, might not in fact be enacted.

Sinking Fund Method.

By this method the rate fixed assumes that there will be returned to the water company annually in addition to other costs and profit, such a sum of money as placed at interest will, by the operation of compound interest amount to the wasted capital at the end of its life. This sum or annuity would be obtained from sinking fund tables. The probable life must first be estimated, taking into account both physical and functional depreciation, and the sinking fund interest rate determined. Here, as in the replacement method, the return to the investor must be based on undepreciated value. Every sinking fund payment and its interest is of such an amount that there is no surplus to provide an intermediate return of capital. As in the replacement method, the fund is not ripe for its intended purpose until replacement is necessary; it earns interest only for the benefit of the sinking fund, and not for the benefit of the owner of the plant. The rate-payer pays each year only the sinking fund increment, and not any sinking fund interest. If a strict sinking fund were established in the hands of a trustee, payable only when depreciation matured, it would be evident that, as in the replacement method, return must be made on the full investment throughout to avoid a confiscation of capital. The method does not, however, imply that such a trusteeship should be established, or even that the fund be kept locked up, say in outside securities. It is conceived that it may be paid to the owner of the property and may be used by him for capital purposes, for example, new additions to the plant. The result is not changed, however, because in such instance the rate-payer has not paid the sinking fund interest, but only the sinking fund annuity, and in the instance given the diversion from sinking fund to capital additions must be made good by new capital from the owner's pocket when the time comes for replacement of the original unit in question. Indeed, such use of the sinking fund is usual in

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practice. It is deemed desirable because it avoids dead capital, and because also it allows the employment of a higher rate of interest for the sinking fund, viz., the rate on the business investment instead of the lower rate on prime securities. Thereby this practice diminishes the rate-payer's burden of annual contribution. On the same assumptions as above, and also assuming that the rate of interest which the sinking fund earns will be six per cent, a table illustrating the sinking fund method may be constructed as follows:[9]

TABLE 2.

Sinking Fund Method.

Capital value $100,000; life ten years; rate of return on investment, and on sinking fund six per cent.

1 Age in years.	2 Capital paid: Cost: Value (new): Replacement Value.	Sinking Fund		5 Depreciation returned.	6 Capital remaining = Residual or Present value.	7 Return on Investment.	8 Combined Return.
		3 Annual Sinking Fund Payment.	4 Interest on Sinking Fund				
0	$100,000	.....	.....	.....	$100,000	.....	.....
1	0	$7,587	.....	0	100,000	$6,000	$13,587
2	0	$7,587	455	0	100,000	6,000	13,587
3	0	7,587	938	0	100,000	6,000	13,587
4	0	7,587	1,449	0	100,000	6,000	13,587
5	0	7,587	1,991	0	100,000	6,000	13,587
6	0	7,587	2,566	0	100,000	6,000	13,587
7	0	7,587	3,175	0	100,000	6,000	13,587
8	0	7,587	3,821	0	100,000	6,000	13,587
9	0	7,587	4,505	0	100,000	6,000	13,587
10	0	7,587	5,230	0	.....	6,000	13,587
		$75,870	$24,130	$100,000	$100,000	$60,000	$135,870

The rate-payer thus provides each year the sum of $13,587, composed of $6,000, return on capital available for dividends, and $7,587, for sinking fund to amortize depreciation.

The sinking fund method conforms to the Knoxville decision, *supra,* in that it takes care of depreciation by annual installments, but it does not conform to that decision in that the rate of return is estimated on undepreciated value. Nevertheless it is obvious that it is a just method to the investor and to the rate-payer in that it conforms to the primary principles referred to at the outset of this discussion; it gives the investor his interest on his investment

[9] Here also, as in table 1, supra, column 6, would better be entitled Rating Base.

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throughout, provides in the rates for the accruing depreciation of the structure, and complies with the principle that the money contributed in advance of the necessity of replacement is made to earn interest in the hands of the company, a credit to the rate-payer.

Residual or depreciated value would obviously in any year equal the value, new, less the aggregate sinking fund payments and their accumulations of interest. Whether the residual value thus found would be the sale value or the present value in fact would of course depend upon whether the sinking fund interest rate corresponded with the rate of depreciation in fact.

Modified Sinking Fund Method: Adams Method: Equal Annual Payment Method.

It is obvious that if you mark off each year from the value of a structure an amount equal to its depreciation in value, and rate the return to the investor upon the depreciated value as a base, you must concurrently return that amount to him in full, or confiscation results. This is the doctrine of the Knoxville case. Now it is a fact that with all long-lived structures in a waterworks, actual depreciation follows approximately a sinking curve; in other words, it is not uniform each year, but is progressive, small in the early years and progressing largely as final dissolution approaches. On this theory the experience of engineers will enable them to adopt a rate of progression and a life expectancy that will enable them to approximate the facts of loss of value as it progresses, and to amortize the value in the rates, on the principle of the sinking fund. The annual depreciation each year would be equal to the sinking fund annuity plus interest on the sinking fund in hand. This sum would each year be deducted from the capital value to get the new rating base. In Table 3 below, at the end of the first year the owner will receive from the rate-payer $6,000 interest on capital value of $100,000 and $7,587 to cover depreciation, being the amount which will equal $100,000 in ten years if contributed each year with compound interest at six per cent. The capital thus repaid being deducted, the return to the investor is $5,545, being six per cent on $92,413 capital, and in addition, to cover depreciation, the annuity of $7,587 plus six per cent interest for one year on the $7,587 repaid the first year. In other words, column 3 in Table 3 is for each year the sum of columns 3 and 4 in Table 2, *ante*. Column 4 of Table 3 is found by adding all prior payments of column 3 of the same table, and column 5

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is determined each year by a subtraction of the amounts in column 4. It is plain that here we have a modification of the sinking fund method producing equivalent results, which meets the rule in the Knoxville case and provides a plan of amortization which approximately conforms to the facts of depreciation. Table 3, upon the same assumption as Table 2, is as follows.

TABLE 3.

Modified Sinking Fund Method.

Investment $100,000; life ten years; investment rate of return six per cent; sinking fund rate of return six per cent.

1 Age in years.	2 Capital invested = Cost = Replacement value.	3 Annual Depreciation Returned.	4 Total Depreciation Returned = Depreciation at end of year.	5 Capital Remaining = Residual or Present Value.	6 Return on Investment for year.	7 Combined Return for year.
1	$100,000	.....	.....	$100,000	.....	.....
		$7,587	$7,587	.....	$6,000	$13,587
2	0	.....	.....	92,413	.....	.....
		8,042	15,629	.....	5,545	13,587
3	0	.....	.....	84,371	.....	.....
		8,525	24,153	.....	5,062	13,587
4	0	.....	.....	75,847	.....	.....
		9,036	33,189	.....	4,551	13,587
5	0	.....	.....	66,811	.....	.....
		9,578	42,767	.....	4,009	13,587
6	0	.....	.....	57,233	.....	.....
		10,153	52,920	.....	3,434	13,587
7	0	.....	.....	47,080	.....	.....
		10,762	63,682	.....	2,825	13,587
8	0	.....	.....	36,318	.....	.....
		11,408	74,090	.....	2,179	13,587
9	0	.....	.....	24,910	.....	.....
		12,092	87,182	.....	1,495	13,587
10	0	.....	.....	12,818	.....	.....
		12,818	100,000	.....	769	13,587
		$100,001			$35,869	$135,870

The method illustrated above is one favored (December, 1913) by a committee of the American Society of Civil Engineers of which Mr. F. P. Stearns, a witness in this case, was chairman. The committee calls it the equal annual payment method, referring to the fact that here as in the pure sinking fund method shown in Table 2, the combined return made by the rate-payer to the water company to cover investor's return plus depreciation allowance, is constant each year for the same capital value. This is a good thing for both parties, avoiding fluctuations in the rates. It is also

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equitable, because as Mr. Adams says: "A structure, no matter what its age, so long as it is serviceable, renders just as valuable service to the consumer of water as though the structure were new." The name is not well-chosen, for if the rates of interest adopted for sinking fund and for investment are not the same, the combined return will not be the same for the different years. I have constructed a table to illustrate this but it seems unnecessary to burden the report with it.

In 1909 Mr. Adams, in collaboration with Mr. Stearns and Mr. Hawgood, constructed and applied to this case a formula which embodies what is called in this record the "Adams Third Method." Where the two interest rates are the same it is identical throughout with the method of the engineers' committee shown in Table 3 above. The Adams method, however, is a true equal annual payment method, for the combined return for interest and depreciation is the same, regardless of differing interest rates. His formula is framed on that basis. I need not follow the theory into its refinements.[10]

Straight Line Method.

The straight-line method, (so-called from the plotted result) as distinguished from the last three methods, which are "curve-line," takes care of depreciation on the assumption that deterioration of all kinds wastes the capital in use an equal amount each year of the estimated life. It is, therefore, like the Adams and the Equal Annual Payment methods, a method which returns capital in installments, here equal each year. Obviously, to avoid injustice to the rate-payer, depreciated value is necessarily the basis of return, since otherwise the utility owner would be getting interest on his full principal, and an installment upon which he could earn further interest. It accords with the Knoxville decision on the assumption that amortization of an equal proportion each year equals depreciation each year. No interest rate is here needed in the calculation

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[10] The Adams formula is $P = \frac{R + A}{R \quad A^1}$, where

P = percentage of new value of a structure having a useful life of N years, at any age $N - Z$ years.
R = Rate of interest on capital.
A = Sinking fund annuity for the first year.
A^1 = Sinking fund contribution at end of any given year $(N - Z)$, which will amortize the residual value if contributed with compound interest for each year of the residual life. The values A, A^1 are found in sinking fund tables.

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to determine annual depreciation installment or depreciated value of capital. In the following table I will, as before, use six per cent for illustration, on the investment value to show the combined return on account of investment and on account of accruing depreciation.

TABLE 4.

Straight Line Method.

Investment $100,000; life ten years; rate of interest on investment six per cent.

1 Year.	2 Capital Paid = Value new = Replacement Value.	3 Depreciation Returned.	4 Total Capital Returned = Accrued Depreciation.	5 Remaining Capital = Residual or Present Value.	6 Return on Investment.	7 Combined Return.
1	$100,000	.....	.....	$100,000	.....	.....
		$10,000	$10,000	.....	$6,000	$16,000
2	0	.....	.....	90,000	.....	.....
		10,000	20,000	.....	5,400	15,400
3	0	.....	.....	80,000	.....	.....
		10,000	30,000	.....	4,800	14,800
4	0	.....	.....	70,000	.....	.....
		10,000	40,000	.....	4,200	14,200
5	0	.....	.....	60,000	.....	.....
		10,000	50,000	.....	3,600	13,600
6	0	.....	.....	50,000	.....	.....
		10,000	60,000	.....	3,000	13,000
7	0	.....	.....	40,000	.....	.....
		10,000	70,000	.....	2,400	12,400
8	0	.....	.....	30,000	.....	.....
		10,000	80,000	.....	1,800	11,800
9	0	.....	.....	20,000	.....	.....
		10,000	90,000	.....	1,200	11,200
10	0	.....	.....	10,000	.....	.....
		10,000	100,000	.....	600	10,600
		$100,000			$33,000	$133,000

The straight-line method is the one used by defendant's witnesses to value. The advantage of this method is its simplicity and comparative ease of application. It conforms with the Knoxville decision in that it returns depreciation in installments while it is accruing, and it bases investment return on the depreciated value thus found. In speaking of simplicity of application it must be remembered that in each of these methods, except the pure replacement method, in other words, in each method where estimated life of the unit of plant is taken into consideration, the computation as to annual depreciation and as to depreciated value must be made for *each unit* of the plant, and not for the plant as a whole. In any event, therefore, the computations for this purpose are

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complex and of some difficulty; it is obvious, however, that the straight-line method is the easiest in application.

Speaking now of disadvantages of the straight-line method, and viewing the matter now purely in the light of a comparison of methods to be pursued from the beginning to end of a plant, the chief disadvantage of the straight-line method is that the money return to be made each year on account both of investment return and depreciation allowance is largest in the earliest years of the plant when it is least likely to make adequate returns, and smallest in the later years when it has become fully established. Of course, this theoretical objection applies only when the plant as a whole is new; when the plant is established with structures coming in and going out all the time it loses its force to a considerable extent.

Another disadvantage of this method, if we assume that the law, whether expressed in the Knoxville decision or otherwise, requires that the annual depreciation installment should approximate the course of depreciation in fact, is that as a general rule depreciation in any structure does not occur in an equal amount each year, but is progressive, that is, tends to follow a sinking fund curve. Defendant's witness, Dockweiler, admits this. An elaborate and rather labored attempt was made by defendant's witnesses to prove that the depreciation of the plant as a whole, taking into account some items that depreciate more rapidly at the beginning, would tend to approximate the straight-line method. Defendant's witness, Mr. Mulholland, who, however, does not profess to have given much thought to the subject of depreciation as an accounting problem, favors the straight-line method, because he believes that experience would show that in an established plant the depreciation of all items would be about equal each year. The obvious defect in all of this evidence is that in our investigations of methods of depreciation we are discussing single units of structure, and not the plant as a whole. I have said before that if the plant were sufficiently complex, the differing values and differing lives might, as a matter of experience, be shown to result in equal installments for depreciation purposes, even under the pure replacement method. If we could plot the results of any of the curve-line methods it might appear that there was a straight-line depreciation of the plant as a whole. But in order to determine the matter with entire accuracy, and in that view to determine which method most nearly approximates a just and correct result, it is obviously necessary to test the method by its application to a single structure.

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Therefore, if the assumption is true that depreciation payments should approximate the actual course of depreciation in fact, the straight-line method is imperfect and unjust to the rate-payer in that it requires him to pay for depreciation in advance of its accrual.

Another objection, and a valid one, is that it does not conform to the rule that payments each year throughout the life of the plant on account of the two elements of investment return and return for depreciation should be equal. This is very well shown by Mr. Dockweiler in his argument for the straight-line method. He was there arguing that the method should be preferred because it meets the rule of equal annual payments in that the payments on account of depreciation each year are equal under this rule. Curiously enough he entirely overlooked the fact that it is the total return for service which should be equal each year, and that this return covers the entire amount paid by the rate-payer, viz, the combined return of interest on investment and depreciation installment.

Another disadvantage of the method is shown in the fact that it takes no account of the principle that money should be considered as earning interest wherever it is. In this connection it is here appropriate to examine the defendant's contention as to the comparative cheapness of this method to the rate-payer.

COMPARATIVE CHEAPNESS TO RATE-PAYER OF FOREGOING METHODS.

In this connection I shall, for convenience, compare only the four methods referred to in this record, namely: Replacement, Sinking Fund, Adams, and Straight-Line methods. The following table shows in comparative form the total amounts paid by the rate-payer to the utility owner on account of depreciation and investment return.

TABLE 5.

Comparison of Total Payments.

Six per cent for both rates of interest.

	1 Depreciation.	2 Investment Return	3 Combined Return	4 Interest earned by Depreciation Payments
Replacement Method	$100,000	$60,000	$160,000	.....
Sinking Fund Method	75,870	60,000	135,870	$24,130
Adams Method.	100,000	35,870	135,870	24,130
Straight Line Method	100,000	33,000	133,000	27,000

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These tables have been assembled from the tables preceding. The first three columns of figures, or specifically the third column shows the total amount of money paid by rate-payers under the different methods.

Mr. Dockweiler for defendant argues at great length and with elaborate tables, that the straight-line method is the cheapest for the rate-payer, and that it is chiefly for this reason that he prefers it. Now, it must be evident upon reflection that such a thing is impossible. All of these methods are correct methods, (I have omitted similar methods upon unsound hypotheses that are incorrect), whose purpose is to return to the investor the waste represented in depreciation of physical structures, and at the same time to assure him a fair return in the way of profit for his service to the community in the form of interest on investment. All of them, if pursued from beginning to end, according to their hypotheses will work out these results correctly in the long run. It is, therefore, impossible that one should be cheaper than another.

This is clearly shown upon an inspection of the above tables. No method shows the return of depreciation and of profit more clearly than the pure replacement method, and yet upon Mr. Dockweiler's theory this would be the most expensive method, since the total rate-payer's payment is $160,000. Obviously, on the same theory, the straight-line method would be the cheapest because its total return on the six per cent basis for interest would be $133,000. The fact is that the replacement method and the straight-line method are of equal cheapness if we consider the fact that money is always earning interest. Under the replacement method $100,000 is not paid over by the rate-payers until the structure is fully depreciated and goes out of use. But during the ten years life which we have assumed, that $100,000 in the hands of the rate-payer has not been locked up in a safe deposit box, but has been earning interest for the rate-payer. The only way to calculate this interest would be by the pure sinking fund method. On general principles of elementary arithmetic this is seen by the table to amount to $24,130, which the rate-payer has earned while he was waiting to hand over the $100,000 to the owner of the utility. The net amount which he has paid, therefore, considering this fact is only $135,870, the amount shown by the various curve-line methods. On the other hand, under the straight-line method the rate-payer has not kept his money earning interest in his own hands, but has handed it over in installments of $10,000 a year

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which would be worth in interest to the company, calculating at six per cent, the sum of $27,000, as a simple calculation would show. Thus, considering the worth of money, the rate-payer pays the same sum, $160,000, to the company under either method. The fact that money paid is worth interest is clearly recognized and taken account of in the sinking fund method and in the Adams method.

Summary of Methods and Conclusions as to Depreciation.

After this elementary discussion we are in a position to draw conclusions upon the question of depreciation, first viewed as a problem in cost accounting, and, secondly, from the standpoint of actual condition,—the facts of depreciation, and the annual amount to be allowed to amortize the remaining value during the remaining lives of the units of the plant.

All of the methods described will work out justly if consistently applied from the beginning to the end of each unit of plant. The replacement method is conveniently applied in the case of a very large property, having varying units of short lives which come in and go out of use with substantial uniformity. In such a case, however, the fundamental mathematics of the method requires that the rate of return be calculated upon undepreciated value, and so, of course, the method cannot consistently stand with the letter of the Knoxville decision. For the latter reason also the pure sinking fund method may be dismissed from consideration.

Both the straight-line method and the modified sinking fund or Adams method, are consistent with the doctrine of the Knoxville case. In the case of a plant having units of short lives, as, for example, ten years, and especially where the values of the units are small, the straight-line method would naturally be preferred on account of its simplicity. It has already been pointed out, however, that there are serious objections to this method, viewed purely as an accounting method, because of heavier payments on account of depreciation in the early life of the unit, and secondly, because the method does not realize the ideal condition of equal annual payments each year on account of the combined total of depreciation payments and payments for interest on the investment. The modified sinking fund or Adams method meets these objections perfectly. The objection to these methods in turn is the difficulties and complexities of the computation. An objection to be made against both methods is that they involve the necessity of esti-

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mating the lives of the units, a difficult thing to do, since engineering is not an exact science, and since experience cannot be applied uniformly where physical conditions surrounding each plant may be expected to differ.

It should be here stated that this comparison of methods has followed somewhat academic lines. It is quite possible in any particular problem in estimating the amortization of depreciation that a method may be selected, preferably on a curve-line basis, and adjusted from time to time according to experience. In the course of time that experience, though founded upon a curve-line basis of progression, may, for convenience, dictate for short periods an annual depreciation reserve built up on the straight-line basis subject to future correction.

H. M. Wright.

Standing Master in Chancery, U. S. District Court
for the Northern District of California.

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The Extralateral Right: Shall It Be Abolished?

III. The Federal Mining Act of 1872.

It was generally recognized that the law of 1866 was a long step in the right direction, inasmuch as it gave explicit federal sanction to mining on the public domain and thus set at rest any question as to what attitude the government would take toward the miners who were for eighteen years prior to its passage technical trespassers.[1] Everyone recognized that the Act of 1866 had been hastily prepared and passed to meet an emergency and thus forestall legislation hostile to the mining interests. Senator Stewart himself in urging the bill of 1871 in the Senate referred to the bill "as an amendment to the law of 1866 that was passed through in rather a crude state."[2] In the next Congress Senator Stewart was again the leader in framing the bill which during that session became the Act of 1872 and was its most active champion. A draft of a proposed act had previously been sent through the mining districts for criticism and the discussion had covered a period of two or three years.

The bill which had passed the Senate in 1871 was reintroduced in the next session of Congress and passed the House.[3] This bill

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[1] A similar situation has but recently arisen on the public domain in connection with the immensely valuable oil lands of California and Wyoming. Oil miners had gone on the public lands, though in this case at the invitation of the government, and expended fortunes in some instances in developing oil. The placer mining law was plainly unsuited to these novel conditions, where discovery of the oil lying at great depth required large capital and considerable time. Many claimants failed to comply with all of the technical requirements of this law and while certain remedial legislation was passed by Congress to improve the situation, the federal government has more recently treated these operators as trespassers and now seeks not only to eject them from these lands but also to recover the value of the oil theretofore extracted. This reversal of the liberal policy adopted by Congress in 1866 is due to the growth of the idea that the best interests of the public demands the reservation and control by the federal government of all natural resources which are vital to the future welfare of the nation and that this new policy is especially applicable to lands containing petroleum which is in demand for use in the navy. 3 California Law Review, 272-291.

[2] Congressional Globe, Feb. 6, 1871, p. 978.

[3] Dr. Raymond in commenting on this bill said: "In its main features it is an eminently wise and salutary measure. Senator Stewart has displayed both courage and judgment in its preparation, and has given new proof of intelligent, earnest devotion to the true interests of the mining industry. Raymond, Mineral Resources (1872), p. 502.

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left the length of lode claims the same as under the Act of 1866 but provided for a maximum width of three hundred feet on each side of the middle of the vein at the surface and prescribed that the end lines should be parallel and at right angles with the general course of the vein.[4]

After the bill had passed the House, the Senate Committee on Mines and Mining evidently did its real work. The various features of the law that required changing were extensively debated. There appeared before this Committee representatives of the mining interests of the West.

Senator Alcorn of Mississippi had charge of the bill as chairman of the Committee and while disclaiming any special knowledge of the subject, yet, as a matter of accomodation, stood sponsor for the measure when it came before the Senate, saying:

> "This bill has been considered by the Committee with great care, each section of the bill has been discussed, and the result is that the report embodies the intelligence brought to the Committee by various persons who appeared before it in the interests of the mining districts. . . . . As to its practical working, I will only say that it is in conformity with what seems to be the settled policy of the Government with regard to mining."[5]

Senator Stewart, who was the real advocate of the bill in its revised form—the form which was substituted for the House bill, already passed by that body,—outlined the general situation leading up to its framing as finally presented for passage. His years of experience with actual conditions

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[4] Congressional Globe (Jan. 23, 1872), p. 533. Mr. Sargent representing California, who had charge of this bill in the House, urged its passage saying: " . . . . The bill does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands. . . . . Now, although the legislation of 1866 was extremely imperfect in the machinery, which since that time we have been trying to improve so that it might be easier for miners to avail themselves of the benefits intended to be conferred upon them by law, yet it showed to observers that the system was correct. . . . . This bill simply oils the machinery a little; it does not change the principles of the law; it does not change the tenures; . . . . Congressional Globe, Feb. 6, 1871, p. 978.

In urging the passage of the Placer Act of 1870, Sargent had used the following language in describing the origin of these mining laws: "The original title or possession depended upon mining laws—a code originally written, modified afterward by custom—a code as well settled and understood by our courts and by the miners themselves as is the Common Law of England by the Courts of the United States—a code eminent for its wisdom, perfected by long experience, and admirably adapted to the conditions and necessities of the people among whom it originated."

[5] Congressional Globe, April 16, 1872, p. 2460.

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in the mining districts of the West and his active interest in mining legislation, ever since he took the leading part in securing the adoption of the Act of 1866, add immeasurably to the weight of his views, which were as follows:

> " . . . . In the first instance the miners legislated for themselves. Congress finally in 1866 passed a bill embodying many of the principles of this bill, and from that time to this the Land Office has been operating under it, and for the last three years we have been attempting to codify it and bring it into a shape that will be satisfactory and more certain and correct abuses. Last year a bill was introduced here and passed which was quite similar to this. A bill has passed the House which is similar to the one that passed here last winter. Since its passage by the House the Delegates from the Territories and those familiar with mining rules have had a great many meetings over this bill in connection with the Committee on Mines and Mining, and the result is a codification, which is the best they can do. I believe it will meet with universal favor. It is a very important bill to be passed to prevent litigation and give certainty to mining enterprises. It provides for a very large district of country where there are important interests dependent upon it which are now in a very uncertain condition involving litigation. This is the best we can get with all the experience we can bring to bear. It is no one man's work, but it is the work of a great many men interested in this business. . . . ."[6]

When the bill as amended in the Senate came up in the House for re-passage, Representative Sargent of California made the following comment:

> ". . . . the variations from the bill as passed by the House are very trifling. . . . .[7] In the Senate the Committee on Mines and Mining and the Delegates and members of the House from the mining Territories and States, aided that Committee in perfecting the bill and improving its machinery. The bill is now entirely satisfactory to every Delegate and every member of the mining States and Territories, as well as to the Committee on Mines and Mining of this House."[8]

The bill as amended passed without any great opposition. In fact the main debate and criticism came from Western members of Congress who were not entirely satisfied with some of the changes made in the original bill by the Senate amendments. The

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[6] Id. p. 2457.

[7] As a matter of fact they were not as trifling as Mr. Sargent would have led his colleagues to believe.

[8] Id. p. 2897.

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right of free mining was not seriously challenged and the subject of the extralateral right which was again confirmed by the new act was not mentioned in the debates in Congress, an indication that no objections of consequence had as yet been made against the continued exercise of this right.[9]

The Act of 1872,[10] again confirmed the right of free mining on the public domain that had already been recognized in the Act of 1866. While the Act of 1872 was intended to limit the operation of the miners' rules and regulations and make the mining law throughout the West more uniform by prescribing in greater detail the specific acts of location, yet the first section of the act expressly provided that mineral lands might be acquired

> "under regulations prescribed by law, and according to the local customs or rules of miners, in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

In this connection the following was said during the Senate debate on the bill:

> Mr. Trumbull (of Illinois).
>
> " . . . . as I understand, it adopts as law the regulations which the miners may make, which may be as various as the mines."
>
> Mr. Stewart.
>
> "Allow me to say that the old law (Act of 1866) adopts them. One of the difficulties is that they have legislated too extensively since the adoption of that law. This curtails their power of legislation, cuts it down to to a very small extent, takes away most of it, takes anything that can be prejudicial, and prescribes the rule so that their legislation cannot interfere with it. That is the main object of the bill."

Section 2, provided that quartz or lode claims theretofore located should be

> "governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location.

[9] When the Placer Act of 1870 was before the House, Julien of Ohio, who had bitterly opposed the passage of the Act of 1866, could not resist the opportunity to vent again his hostility, and speaking of the extralateral grant of the latter Act said: "I admit that there may be a hardship in allowing a man to discover and hold a lode or vein of mineral which can be traced to the land of another from which he is debarred. There is hardship in that; but there is far greater hardship in the law as it now stands, recognizing the right everywhere to pursue a vein or lode on the land of another, inasmuch as it breeds interminable litigation and never can be resorted to as a method of settling titles to these lands." Congressional Globe, March 17, 1870, p. 2029.

[10] U. S. Stats. at Large, p. 91 et seq.

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> A mining claim located after the passage of this Act, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode. . . . ."

As already noted, when the bill to amend the Act of 1866 passed the Senate in the previous session of Congress, and when the bill, which, as afterwards amended, became the Act of 1872, was reintroduced in the next session and first passed the House, it left the length of the lode claims unchanged, that is, two hundred feet along the vein for each locator and a maximum length of three thousand feet in one claim for an association of persons. The reasons for making this change were stated by Senator Stewart in the course of the debate on the bill to be as follows:

> " . . . . In the Act of 1866 it is true that the locator was confined to two hundred feet, and two hundred feet additional for the discoverer of the lode, making four hundred feet. It allowed him to unite in companies until they got three thousand feet. In practical operation it is thought by the Delegates generally, and that is the experience, that three thousand feet is longer than can be worked at one place conveniently, but fifteen hundred feet makes a very reasonable claim. The practice under the other law was for them to put in fictitious names and buy them out, and you could not prevent them doing it. This matter was discussed considerably; we had several meetings on this point and the committee thought it was best to let them do directly what was reasonable, and not have them do anything indirectly.[11] It is a matter to which I am not especially wedded, but it was the result of three or four meetings of all the parties interested as to which plan should be adopted, and this was the one which was selected."
>
> Mr. Cole, (one of the Senators from California).
>
> "I have heard the Senator's explanation, and it is not satisfactory to me at all, because I know by the rules of miners claiming the mines upon these ledges for a long time,

[11] It is worth noting that this same act amended the Placer Act of 1870 by reducing the amount of ground that an individual could locate from 160 acres to 20 acres and by providing that an association of eight persons was necessary to locate 160 acres in one claim. Revised Stats., § 2330. This change gave rise to the same use of fictitious names or "dummies" in the case of placers, that Senator Stewart points out had occurred in the case of lodes, in order that an individual might acquire indirectly what the law prohibited him from acquiring directly. It is strange that this defect in the lode law should have been remedied by the same statute that injected it into the placer law. It was due to the fact that Mr. Cole of California, who evidently did not believe in large claims and who had objected to the increase of length of lode claims from 200 feet to 1500 feet, insisted on reducing the placer area an individual might locate from 160 to 20 acres. See Congressional Globe.

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two hundred feet was the limit to which they restricted each other, and to allow persons now to obtain title, each individual to fifteen hundred feet upon the lode, is certainly a very great leap forward. It is in my judgment too much of an extension."[12]

Mr. Casserly:—"Does the Senator (Stewart) consider that there is no danger of abuse in allowing so great a quantity?"

Mr. Stewart—"None in the world."[13]

Another clause of Section 2 provided that "no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface," and no mining regulation was permitted to reduce the width to less than twenty-five feet on each side of the vein. This provision was an attempt to bring uniformity out of the chaotic condition previously existing under the Act of 1866, which had only prescribed a uniform linear measurement along the vein and had left the determination of the surface area accompanying the vein to be determined by local laws. The Act of 1866 had granted a certain length of lode, but the shape and size of the surface area of the claim were incidental, while the Act of 1872 granted a surface area of prescribed dimensions containing the lode.[14] The intention of the miners under their earlier regulations prior to 1866, judging from the phraseology of the rules and their lack of regard for lateral surface measurements, was undoubtedly to secure to the locator a certain length of lode irrespective of the surface containing it.[15] The courts later held, however, that a patent granted under the Act of 1866 conveyed rights only to the length of lode actually included in the surface boundaries of the claim as patented, and the fact that greater number of linear feet along the lode was claimed under the rules and regulations of miners did not give the claimant any right to any portion of the length of the lode outside of his surface lines.[16] The Act of 1872 cleared up this objectionable situation by emphasizing the surface and prescribing a definite and conventional surface area which was theoretically, at least, to include the middle of the vein at the sur-

[12] Congressional Globe, April 16, 1872, p. 2458.

[13] Id. p. 2462.

[14] Lindley on Mines, § 71; Gleeson v. Martin White M. Co. (1878), 13 Nev. 442.

[15] ". . . . the claim was of so much of the lode in whatever direction it might be found to run, with a strip of the adjacent surface, taken for convenience in working the lode and as a mere incident or appurtenance thereto." Beatty, Report of Public Land Commission (1880), p. 397.

[16] This situation and its development is comprehensively treated in Lindley on Mines, §§ 58-60.

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face. As was stated by Dr. Raymond in his comment on the Act of 1872:

> "The section giving absolute title to a certain surface and and all veins 'topping' within vertical lines drawn from the boundaries of that surface-claim, is necessary to prevent special litigation."[17]

This surface provision of the Act of 1872 was but the adoption of a stereotyped form of surface measurement for lode claims that had been in existence for centuries in the Germanic and Derbyshire lode mining laws. Under these latter laws a specified surface width on each side of the vein at the surface was the prescribed mode of laying out lode claims.[18] Whether these foreign laws served as a model in this respect is doubtful. There is nothing in the Congressional debates on the bill which gives us information on this point and the hearings of the Committee on Mines and Mining where the source of the provision might have been noted are not available. It has already been mentioned that many of the mining district regulations prescribed the maximum width of lode claims which should be measured "on each side of the center of the lead," and that in some of them as well as in the territorial legislation of Arizona a maximum total width of six hundred feet or two hundred yards for each claim had been prescribed.[19] It is probable that this provision of the Act of 1872 was patterned after these local laws.

A very interesting feature of Section 2 of the Act of 1872 was the concluding provision of that section providing that "The end lines of each claim shall be parallel to each other." The Act of 1866 was silent on the subject of end lines of lode locations and as a consequnce end lines of locations made under the Act were seldom parallel and often broken and of varying length. As Justice Field stated in the Eureka case,[20] end lines or rather end line planes at right angles to the general course of the vein were implied under the Act of 1866.[21] A careful search of local rules and state

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[17] Raymond, Mineral Resources (1873), p. 453.
[18] 4 California Law Review, pp. 365-6, 375.
[19] Id. pp. 448-450.
[20] (1877), 4 Sawy. 302; Fed. Cas. 4548.
[21] The Germanic and Derbyshire laws were equally silent on this subject of the manner of making end line measurements and yet each of these laws was interpreted to impliedly confer extralateral rights between end line planes at right angles to the general course of the vein. Even under the Spanish mining ordinances of 1783, the surface claim was a rectangle with end lines, theoretically, at least, at right angles to the course of the vein. See 4 California Law Review, pp. 366-7, 375-6, 383.

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and territorial legislation fails to disclose any which provided that the end lines of locations should be either at right angles to the general course of the vein or that they should be parallel, except the territorial laws of Arizona which called for lode locations with a surface two hundred yards square and the right to follow the vein on its dip. Attention has been called to the fact that the bill introduced in Congress in 1871 and the similar bill as originally introduced in the next session, which eventually, as amended, became the Act of 1872, provided that the end lines should be parallel "and at right angles with the general course of the vein," thus adopting what had theretofore been commonly accepted as the legal longitudinal limitation of the segment of vein located. Why the right angle end line provision was eliminated from the bill as finally adopted and only the requirement of parallelism retained does not appear in the debates and was probably determined upon at the unreported hearings in Committee. Evidently the idea was to permit the locator to lay out his parallel end lines in any direction and thus enable him to follow down on a valuable ore shoot in the vein which might trend or rake away from the true dip or perpendicular. If this was the intention, it was "putting the cart before the horse," for it is rarely that the locator at the time of location has any idea where ore shoots exist in the piece of vein he locates and much more rarely that he knows their trend. End lines might after location be readjusted as to direction and in this manner the locator might be enabled to include within his extralateral sweep a valuable ore shoot subsequently discovered and to follow it down. In practice, however, by the time the facts are discovered, contiguous locations on the apex of the vein will usually prevent such readjustment. It would seem to have been preferable to have retained the right angle end line requirement, for under such a rule end lines of locations placed along the apex of a vein would be more nearly uniform in direction, and conflicting extralateral rights in depth much less frequent. Of course, a decided change in the direction or course of the vein at the surface would have produced underground conflicts if the requirement of end lines at right angles to the local course of the vein were strictly followed. But the language of the earlier mining bill called for right angle measurement to be made from "the *general* course of the vein." If this wording had been retained in the Act as finally passed it would certainly have materially lessened the litigation directly traceable to the extralateral right provision. By laying

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out a base line on the surface representing the general course of the vein, as was done on the Comstock lode and also for a time in Australia, then projecting the end lines of the various claims taken up along the vein at right angles to this base line, and thus measuring the extent of each locator's right to follow the vein extralaterally down on its dip, there would have been afforded the most scientific and harmonious measure of this right possible to devise.[22]

Section 3 of the Act of 1872 is as follows:[23]

> "That the locators of all mining locations heretofore made, or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists at the passage of this act, so long as they comply with the laws of the United States and the state, territorial, and local regulations, not in conflict with said laws of the United States, governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations and of all veins, lodes, and ledges, throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of said surface locations; provided, that their right of possession to such outside parts of said veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as aforesaid, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of said veins or ledges. And provided further, that nothing in this section shall authorize the locator or possessor of a vein or lode which extends, in its downward course, beyond the vertical lines of his claim, to enter upon the surface of a claim owned or possessed by another."

This section is identical with Section 3 of the bill which passed the Senate in 1871. It merely confirms in more elaborate and explicit language the right which had been created by the early miners, subsequently written into their local regulations and state and territorial legislation, and later recognized in the Act of 1866. The only point of material difference was the extension of this right under the Act of 1872 to "all veins" which were found to

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[22] See "The Law of Apex" (1914) by Kenney, a volume devoted to an expostion of this interesting principle. Also see 4 California Law Review, p. 385.

[23] See U. S. Revised Stats., § 2322.

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apex within the surface of each location. The Act of 1866 had confined the extralateral right to the one main vein. This had given rise to so much uncertainty and litigation that it was deemed best to extend the right to all veins occurring in the surface area located, thus removing the temptation to trespass on another's claim in the attempt to discover or locate a secondary vein which might exist therein.[24]

The use of the words "top" or "apex" with reference to the veins found in the surface location, appears to have been the first use of these terms in this relation.[25] The miners' regulations the state and territorial legislation and the Act of 1866, all provided for the location of a specific "length along the vein." It was taken for granted that this meant that the location should include the outcrop or "top or apex" of the vein or that portion of its upper or terminal edge lying nearest the surface.[26] With the appearance of these terms in the Act of 1872 came into existence the expression the "Law of the Apex," which has since been extensively used to describe the extralateral right feature of the Act. The use of these terms, however, did not change the character of the extralateral right one iota; they were merely descriptive of a portion of the vein which it had always been assumed must form the basis of the location.

This discussion is concerned only with those portions of the Act which have a direct bearing on the extralateral right. Section 4 granted a unique tunnel right which included the right to such veins or lodes as might be discovered in the tunnel.[27] Aside from a provision contained in Section 11 applicable to veins found to exist in placer claims and Section 14 which provided that priority of title should govern where veins intersected or crossed each other and also where they united in depth, the Act was devoted to other subjects than the extralateral right.

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[24] "The law of 1866 was fatally deficient . . . . in failing to prohibit prospecting within the surface-lines of an already located claim" but the amendment of 1872 may be considered ample to remedy this defect. Raymond, Mineral Resources (1874), p. 513. See also Raymond, Mineral Resources (1870), pp. 433-436.

[25] Stevens v. Williams (1879), Fed. Cas. No. 13,414. For a complete discussion of these terms, see Lindley on Mines, §§ 305-313.

[26] The Derbyshire and Germanic laws only called for a certain length of vein and there was no attempt to define the portion of the vein to be located. It was assumed that this would be the top or upper edge of the vein.

[27] This provision was included for the protection of certain Colorado miners. Senator Stewart in Congressional Globe (1872), pp. 978-9.

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Looking at the Act of 1872 broadly we see that the fundamental principles created by the miners under their own laws and customs, later embodied in state and territorial legislation and eventually crystallized in the Act of 1866, were not materially altered by the Act of 1872.[28] The basic right of free mining was retained unchanged and the extralateral right was again confirmed, though in more elaborate language. With the exception of the parallel end line provision which supplanted the implied right angle end line measurement under the previous law and the grant of *all* veins found apexing in the surface location, the extralateral right remained the same in substance. As already noted, the surface area obtainable under the new act was described with great detail. The adoption of the basic features of the miners' laws, and the elaborate provision contained in the Act governing acquisition of the surface claim rendered the local rules and regulations of the mining districts practically obsolete. Though the Act recognized such local laws and customs as did not conflict with the federal Act their value was largely a thing of the past. They had served their important purpose and they gradually died a natural death.

The Act of 1872 was generally considered a great improvement over the imperfect and incomplete Act of 1866.[29]

It was later codified and became a part of the federal Revised Statutes,[30] and is, with a few minor additions and modifications, the mining law in force today governing the acquisition of mineral lands on the public domain. The extralateral right feature of the Act has remained unchanged. It is not the purpose of this article to present the detailed interpretation of this extra-

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[28] "It (the Act of 1872) recognized the essential principles found in the miners' regulations." Charles J. Hughes, Jr., Address on "The Evolution of Mining Law." XXIV, Reports of American Bar Association (1901), p. 344.

[29] Judge Beatty said in the Gleeson v. Martin White M. Co. case, supra, n. 14, referring to the Act of 1872: "Nobody can pretend that it is perfect; but to our minds it is a great improvement on the system which it displaced."

Dr. Raymond in commenting on the Act, wrote: "It embodies much that I have advocated in former reports, and I think it will be approved by the large body of practical miners in the United States, who whatever criticisms they may make upon particular provisions, must agree in commending the tone which mining legislation has assumed, and the character of the protection offered to their property." After making some minor criticisms of features of the law, he added: "Nevertheless it is certain that the present law is a great advance on anything we have had." Raymond, Mineral Resources (1873), p. 454.

[30] §§ 2319-2337.

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lateral grant, gradually built up by court decisions. This may be found in the leading works dealing with the subject of mining law.[31]

Before taking up the concluding phase of this discussion, which will be a consideration of the proposed abolition of the extralateral right, it may be worth while to sum up briefly the evidence bearing on the origin of the extralateral right in the United States.

If the miners' rules and regulations were patterned after mining laws of other countries we have no direct evidence bearing on the question. There were men, however, who would have been likely to have possessed some information on this subject if it had existed. Senator Wm. M. Stewart who, as we have seen, not only took the leading part in framing the Act of 1866, but also did more than anyone else in drafting the Act of 1872, had spent years in the mining districts and associated with other Senators and Congressmen from the West who aided in moulding this legislation and, as the debates reported in the Congressional Globe of that period show, were, many of them, originally miners themselves. Senator Stewart also met with delegations of miners from the Western States and Territories and discussed extensively all of the features of the mining law.

Stephen J. Field had grown up with the mining districts. He represented the miners in the California State legislature in 1851, and secured the enactment of the section of the Practice Act making the customs, usages and regulations of the "bar or diggings" govern in actions respecting mining claims. He had previously been an alcalde and later went from the supreme bench of the State to the Supreme Court of the United States. As Judge Lindley has said in his eloquent tribute to Justice Field, he had "the practical knowledge acquired by personal contact with the mining communities" and "was a part of the history of which he wrote."[32]

Justice Wm. H. Beatty was for years a district judge in the mining regions of Nevada and became the Chief Justice of the Supreme Court of that state and later, up to the date of his recent death, was Chief Justice of the Supreme Court of Cali-

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[31] Lindley on Mines, §§ 581-615; Costigan, Mining Law, pp. 417-452; Barringer & Adams Law of Mines, pp. 437-470; Morrison, Mining Rights, (14th ed.), pp. 192-219; 1 California Law Review, pp. 336-358.

[32] Lindley on Mines, § 44.

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fornia. He was greatly interested in the miners' rules and regulations and thoroughly conversant with their history.

These three men were pre-eminently qualified to discuss the evolution of the mining law of the West; each of them was deeply interested in its origin and development and they were constantly in direct contact with the pioneer miners and discussed problems arising out of the mining industry. One or the other of these men would surely have learned of the source of these local laws if this source were directly traceable to mining laws of other countries. On the contrary, we nowhere find in their remarkably lucid and complete presentations of the history and development of these laws any reference whatsoever to any foreign mining law as furnishing the basis for these early customs and regulations.

Senator Stewart in his famous speech in the United States Senate advocating the passage of the Act of 1866, described the exciting emigration to California following upon the discovery of gold, saying:

> "Upon the discovery of gold in California, in 1848, a large emigration of young men immediately rushed to the modern Ophir. These people, numbering in a few months hundreds of thousands, on arriving at their future home found no laws governing the possession and occupation of mines but the common law of right, which Americans alone are educated to administer. They were forced by the very necessity of the case to make laws for themselves. The reason and justice of the laws they formed challenge the admiration of all who investigate them. Each mining district, in an area extending over not less than fifty thousand square miles, formed its own rules and adopted its own customs. The similarity of these rules and customs throughout the entire mining region was so great as to attain all the beneficial results of well-digested, general laws. These regulations were thoroughly democratic in their character, guarding against every form of monopoly, and requiring continued work and occupation in good faith to constitute a valid possession."[38]

Nowhere in his entire eloquent appeal for recognition of the principles established by the miners themselves, with its many detailed references to the democratic origin of these rules, does Senator Stewart mention their having been patterned after mining laws of other countries.

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[38] 70 U. S. 777, Appendix.

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In his classic description of the gold rush to California, Justice Field, speaking of the pioneers, says:

> "Wherever they went, they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated," etc. . . . . They were so framed as to secure to all comers,, within practicable limits absolute equality of right and privilege in working mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the lawmakers, as respects mining, upon the public lands in the State."[34]

Justice Field above all others should have known whether these laws were of foreign origin and yet he makes no reference to any such source.

Justice Beatty while Chief Justice of the Supreme Court of Nevada was requested by the Public Land Commission to give his views on the mining laws.[35] From his comprehensive and illuminating reply the following is quoted:[36]

> "When placer mining began in California there was no law regulating the size of claims or the manner of holding and working them, and local regulations by the miners themselves became a necessity. They were adopted, not because the subject was too complicated or difficult for general regulation, but because they were needed at once as the sole refuge from anarchy. The first and most important matter to be regulated was the size of claims, and the earliest miners' rules contained little else than a limitation of the maximum amount of mining ground that one miner might hold."

He outlined the addition of other requirements to the placer rules and then added:

> "After these regulations had been some time in force came the discovery of veins or lodes of gold-bearing rock in place, and to them the law of the placer was adapted with the least possible change."

It is quite clear that Justice Beatty did not have in mind any thought but that the lode mining regulations were founded on the placer rules that had just been established and that it was a natural step from the one to the other.[37] If he had entertained

[34] Jennison v. Kirk (1878), 98 U. S. 453, 457-8.
[35] Report of the Public Lands Commission (1880), pp. 395-402.
[36] Id. p. 396.
[37] J. Ross Browne entertained the same view, for in his report of 1867 on Mineral Resources, p. 231, he states that the early quartz regulations were framed "under the influence of persons familiar only with small claims customary in the placers."

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any idea that the local lode laws were patterned after any system of mining law imported by miners from foreign countries, he would certainly have mentioned a fact of such unusual interest.

The mere failure of these three distinguished men, who were admittedly pre-eminent in their knowledge of the subject with which they were so intimately associated, to mention the fact that our lode mining law had a foreign origin, does not, of course, prove conclusively that it did not have some such basis. However, all fair minded persons must admit that such foreign influence if it actually existed must have been kept a profound secret, otherwise one or the other of these men would certainly have learned of it and called attention to it.

The main support for the idea that our lode law and its extra-lateral right was derived from foreign sources is to be found in Yale on "Legal Titles to Mining Claims, etc." Speaking of the origin of these rules and regulations he says:[88]

> "The real mining code, as far as it can be traced by legal ear marks, has sprung from the customs and usages of the miners themselves, with rare applications of common law principles by the Courts to vary them. Most of the rules and customs constituting the code, are easily recognized by those familiar with the Mexican ordinances, the Continental Mining Codes, especially the Spanish, and with the regulations of the Stannary Convocations among the Tin Bounders of Devon and Cornwall, in England, and the High Peak Regulations for the lead mines in the county of Derby. These regulations are founded in nature, and are based upon equitable principles, comprehensive and simple, have a common origin, are matured by practice, and provide for both surface and subterranean work, in alluvian, or rock *in situ*. In the earlier days of placer digging, in California, the large influx of miners from the western coast of Mexico, and from South America, necessarily dictated the system of work to Americans, who were almost entirely inexperienced in this branch of industry, with few exceptions from the gold mines of North Carolina and Georgia, and from the lead mines of Illinois and Wisconsin. The old Californians had little or no experience in mining. The Cornish miners soon spread themselves through the State, and added largely by their experience, practical sense, and industrious habits, in bringing the code into something like system. The Spanish-American system which had grown up under the practical

[88] (1867), pp. 58-9.

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working of the mining ordinances for New Spain, was the foundation of the rules and customs adopted.

"Senator Stewart has ascribed undeserved merit to the early miners in pronouncing them the authors of the local rules and customs. . . . . But they were not the spontaneous creation of the miners of 1849-50. Historical accuracy ascribes a different origin to them. They reflect the matured wisdom of the practical miner of past ages, and have their foundation, as has been stated, in certain natural laws, easily applied to different situations, and were propagated in the California mines by those who had a practical and traditional knowledge of them in their varied form, in the countries of their origin, and were *adopted,* and no doubt gradually improved and judiciously modified by the Americans. This self-evident fact can be admitted without detracting from our national pride."

Yale also gives General Halleck's opinion of their origin.[39]

"General Halleck ascribes to them a more limited origin, otherwise agreeing in the statement made. In his introduction to the translation of De Fooz, he says: 'But the miners of California have generally adopted, as being best suited to their peculiar wants, the main principles of the mining laws of Spain and Mexico, by which the right of property in mines is made to depend upon *discovery* and *development;* that is, *discovery* is made the source of title, and *development,* or *working,* the condition of the continuance of that title. These two principles constitute the basis of all of our local laws and regulations respecting mining rights.' (De Fooz, §§5, 7.)"

He concludes with a statement which more nearly embodies what is probably the real truth of the matter as far as the origin of these laws is concerned.

"An examination of the mining codes of different nations, tracing them back to remote antiquity, and through modern legislation, tested by the philosophical principles of comparative law, would, probably, result in the conclusion that they have a common origin, maintaining certain general equitable principles upon which all are agreed, and differing only in the details which a diversified ownership, the peculiarities of race, and condition of locality necessitate."

It seems quite certain that both Mr. Yale and General Halleck are mistaken in attributing the origin of these rules and regulations to Spanish influence. As already pointed out, the Spanish-Mexican mining laws were inoperative and unknown in

[39] Id. p. 71.

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this new region at the time the early miners' laws were framed.[40] The requirements of discovery and development were universal requirements and were not characteristic of Spanish law alone.

Direct Germanic influence is also doubtful and the complex Germanic form of extralateral right is so different from the simple form of this right which developed in this country that the Germanic extralateral right could only remotely have suggested the idea here.[41]

Many writers attribute the source of our mining laws to Cornish influence. This idea does not seem well founded, for no extralateral right was exercised in the tin mines of Cornwall or Devonshire and the ancient right of tin bounding or right of staking out a mining claim on waste land had almost ceased to be exercised.[42] Most of the lode mining in Cornwall and Devon was carried on under leases from the Duke of Cornwall.[43] The fact that the Duke of Cornwall had the right to these mines and in leasing them, naturally, gave the lessee the right to follow the veins down indefinitely in depth and thus severed them from the surface, may have had something to do with the idea expressed in the early regulations here, that the vein was the principal thing and the surface a mere incident.

It cannot be denied, however, that the Cornish influence was pronounced. The early and widespread use in the miners' regulations of the term "lead" or "lode" and the appearance in these local rules of such terms as dips, spurs, angles, slides, fitters (flitters), leaders, dial (survey), offshoots is quite positive evi-

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[40] 4 California Law Review, pp. 437-8; Hon. Charles T. Hughes, Jr., in his interesting article on "The evolution of Mining Law" (Vol. XXIV, Report of American Bar Association, p. 343) in summing up his views, has this to say on the Spanish influence: "The early miners, in their mountain gulches, in their humble cabins, at their primitive assemblages, unfamiliar with the history of mining laws and regulations in the old world, and even with the Spanish regulations which had prevailed in the very territory which they occupied, seized upon the aptest, wisest and most beneficial principles which could have been adopted, and by vigorous, strenuous, independent, but respectful assertion of their rights, secured their recognition at the hands of the general government, to the incalculable enrichment and advantage of the entire nation."

[41] Aguillon in his "Legislation des Mines, Étrangère" (1891), Part II, p. 292, in commenting on the American extralateral right, says: "It is, one realizes, the system of defining the claim by the ancient law, notably the German system of Langenfelder or Gestrektefelder."

[42] "Through the scarcity of wastrel land it (in bounding) has, however, become more or less obsolete." (Vol. II, Part I, p. 32) Transactions of the Mining Association of Cornwall.

[43] Bainbridge on Mines & Minerals (5th ed.), pp. 121, 133-134; Mac Swinney, The Law of Mines etc. (3rd ed.), pp. 176-177.

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dence that Cornishmen supplied a large part of the mining vocabulary.

The resemblance of the extralateral right which was created by the miners here to the similar simple form of that right existing in Derbyshire, England, has led many to claim a direct relationship. This is doubtful, and unless some direct proof of Derbyshire influence can be adduced, the weight of evidence seems rather opposed to this view. If the Derbyshire influence had been pronounced, we would expect the Derbyshire term "rake," meaning vein, to have supplanted the Cornish "lode," and yet the word "rake" does not appear in any of the regulations.

If we examine the regulations themselves, the simplicity of the language employed, and the variations of expression used in the different districts to describe the same right, lead to the conviction that instead of being knowingly patterned after other mining codes, these local laws were merely the direct outgrowth of the necessities of the hour. It became necessary to apportion the placer ground among the increasing number of miners flocking into the mining districts and small square or rectangular areas of surface were naturally adopted as the size of claim to which each miner was entitled. But when veins became important it was equally natural for the miner to apportion the vein in short lengths and disregard the surface as something unimportant, for the vein was the thing of value. To follow the vein down on its dip to the extent that the miner owned of length was also a natural and normal sequence, for the miner was the discoverer of the top of the vein and why should he give up to another the vein on its dip when that other had nothing to do with finding it? Probably some such line of thought in the minds of these pioneers resulted in the adoption of their early rules regulating lode claims, including the extralateral right. That they did not have in mind any definite laws as a pattern granting the extralateral right to the locator, is further borne out by the fact that the extralateral right first appeared in the Saunders' Ledge regulations on June 6, 1851, in Nevada County, where the words "dips and angles" were employed to describe the right and one hundred feet in length on the ledge constituted a claim while, on June 7, 1851, only the day following, the miners of Drytown Mining District, Amador County, adopted regulations establishing the length of claims to be two hundred and forty feet in length of the vein "without regard to

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width" which was only another way of expressing the same idea that there was no limitation on the right to follow the vein in depth. Other regulations granting the same right to follow a certain length of vein indefinitely in depth were expressed in language which varied in each case. This diversity of expression to convey the same general idea of a right to follow down on the vein indefinitely and also the varying length of vein awarded to the locator in different districts, argue strongly against any idea of a definite prototype which influenced the drafting of these regulations.

The resemblance of many features of these regulations to the provisions of other systems of mining law is merely confirmation of the fact that if intelligent persons are confronted with a state of affairs creating a situation which demands regulation by a set of rules, they will frequently arrive at results similar in their broader aspects. Dictates of common sense will usually direct the adoption of rules based on equitable considerations. It seems quite certain that the pioneer miners of California proceeded along similar lines and met the situation which confronted them by adopting laws governing their mining operations, similar in many respects to other laws which had been evolved elsewhere under like circumstances. The similarity was a coincidence rather than the result of a deliberate recognition of pre-existing laws.[44]

Wm. E. Colby.

Berkeley, California.

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[44] Walmesley in "The Mining Laws of the World" (1894), p. 163 says: . . . . . "The California system was probably not due to Mexican influence. The principle of possessory tenure, dependent upon continued work, is probably German in origin, and passed from Germany to other countries. Together with all the other peculiarities of the California system, it was adopted under the pressure of the peculiar circumstances of the case, a great rush of population to the gold-fields, more people than room for them, no courts, no surveyors, and an overwhelming necessity for simple right of property, based on priority and possession, and determinable by mere tape-line measurement, without surveying. These causes adequately explain the whole result." The basis of most of Walmesley's statements is the testimony given by Dr. Rossiter W. Raymond before the Royal Commission on Mining Royalties. (Third Report: England).

The presence here of foreigners in large numbers from all parts of the world lends weight to the idea that in a broad way, at least, certain fundamental principles may have been suggested by them to the original framers of these local codes, who may have thus been confirmed in their codification of similar ideas.

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Inalienable Rights of Property: A Study of Contract Obligations and Other Vested Rights

IV. Individual Rights of Specific Individuals Under Transactions With Public Authorities.

Whether public authorities may incur indefeasible contract obligations in favor of individuals.—A state, or public authority thereof that is duly empowered, may enter into a valid and binding contract with a private individual, the obligation of which can no more be impaired by subsequent legislation than can the obligation of a contract between two or more private individuals.[1] In case of the alteration or repeal of the act by acceptance of which the contract arose, the contract continues to possess the same operative and binding force as before.[2] "The legislature cannot, by merely changing the name of a municipal corporation, or by abridging or enlarging its territory, so destroy its identity as to impair the rights of its creditors to the enforcement of their obligations against the original corporation."[3] An attempt by the legislature to extinguish the debts of a city by disincorporating the city and causing

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[1] People v. Brooks (1860), 16 Cal. 11, 47, 50; Hutton v. Frisbie (1869), 37 Cal. 475, 511; Rose v. Estudillo (1870), 39 Cal. 270, 274; Floyd v. Blanding (1879), 54 Cal. 41, 45, 4 Pac. Coast L. J. 424; San Francisco Gas Light Co. v. Dunn (1882), 62 Cal. 580, 585, 8 Pac. Coast L. J. 1083. Contra, Myers v. English (1858), 9 Cal. 342, 349, 351.

[2] People v. Brooks (1860), 16 Cal. 11, 33, 50; "If the legislature could destroy a contract entered into by the state by the repeal of the law which authorized it, no contract could ever be made binding upon the state. The performance of the stipulation of any contract on her part, and the obligations to such performance, would depend purely upon the will of the legislature. Such a proposition cannot be maintained." Babcock v. Middleton (1862), 20 Cal. 643, 656.

[3] Bates v. Gregory (1891), 89 Cal. 387, 395, 26 Pac. 891, the court holding (pp. 395-7), that where Sacramento city was incorporated by Stats. 1851, p. 391, with certain boundaries, and by Stats. 1858, p. 267, the city and county of Sacramento were consolidated into one government covering the whole territory of both, and by Stats. 1863, p. 415, the city of Sacramento was reconstituted as a distinct municipal corporation with the original boundaries, the legislature did not by such changes impair the rights of the holders of certain bonds duly issued by the original city to bring and maintain suit thereon against the city as reconstituted.

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its property which was subject to execution to escheat to the state, and thereupon incorporating a new city within the same territorial limits but without debts, would be unconstitutional and void.[4] Where Reclamation District No. 70 (New 70) was created and its boundaries fixed by statute[5] and as so constituted it embraced within its limits all the territory of Swamp Land District No. 70 (Old 70) besides other territory, the absorption of Old 70 by New 70, and, to that extent, extinguishment of the existence of Old 70 could not, even should the legislature so design, operate to impair any of the rights of the creditors of Old 70 in existence at the time New 70 was created, nor to so completely destroy Old 70 as to render the just claims of its creditors unenforceable against it.[6] Where the State Board of Harbor Commissioners, in consideration of wharfage paid it, received upon one of its public wharves at San Francisco a consignment of coal, and by reason of want of ordinary care in the upkeep of the wharf, it gave way under the coal, and the coal was lost in the waters of the bay, the state was bound by such contract to the same extent that an individual engaged in the same business would have been by a similar contract, and was liable to that extent for its breach of contract in failing to exercise ordinary care for the safety of the coal, although the usual remedies for breach of contract were not available against it.[7]

What amounts to contract between individual and public authority.—The existence of a contract between an individual and a public authority must be established clearly and not by vague conjecture or plausible presumption.[8] Yet that there may be a valid and binding contract between the state and a private individual, it is not necessary that there be a consideration moving from the individual to the state; it is sufficient that, on the faith of the contract, the individual has invested his money or employed his time and labor in furtherance of the enterprise which is the subject-matter of the contract.[9]

Thus where a statute of 1856[10] required the State Board of Prison Commissioners to lease for five years the state prison

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[4] Smith v. Morse (1852), 2 Cal. 524, 555.
[5] Cal. Stats. 1905, p. 717.
[6] Reclamation District No. 70 v. Birks (1911), 159 Cal. 233, 238, 113 Pac. 170.
[7] Chapman v. California (1894), 104 Cal. 690, 694, 38 Pac. 457, 43 Am. St. Rep. 158.
[8] Floyd v. Blanding (1879), 54 Cal. 41, 47, 4 Pac. Coast L. J. 424.
[9] Floyd v. Blanding (1879), 54 Cal. 41, 45, 4 Pac. Coast L. J. 424.
[10] Cal. Stats. 1856, p. 48.

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grounds and property with the labor of the convicts, the lease thereof to require the lessee to take full control, custody and care of all convicts and erect at his own expense such buildings as would conduce to the safekeeping and working of the convicts, and to entitle the lessee to the labor of the convicts and to payment by the state of a monthly sum fixed by the lease, not exceeding fifteen thousand dollars appropriated from the state treasury per month for each month of the lease the amount of the payment specified in the lease, and required the state controller to "draw his warrants on the treasurer of the state for said sum" each month, and the treasurer "to pay the said warrants on application of said lessee in writing on the last day of each month," a five-year lease, made pursuant to said act, and providing for a monthly payment of ten thousand dollars to the lessee, constituted a contract, valid against and binding upon the state.[11]

Subsequently, when the validity of this contract was again unsuccessfully questioned, the Supreme Court, as an additional reason for affirming its validity, declared:[12]

> "We do not admit that an affirmation of a contract entered into by the agents of the state, upon a subject within the constitutional control of the legislature, can only be made by direct legislative action in terms designating such contract. On the contrary, such affirmation may be justly inferred from legislation indirectly referring to the contract, or proceeding upon its assumed validity.
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> "Thus, in the act of April 7th, 1856, appropriating moneys to defray the expenses of the [state] prison up to March 28th, passed after a copy of the contract with Estill (whereby he took the five-year lease) had been transmitted to the senate, the legislature recognized the existence and in effect the validity of the contract in the provision that no person should receive any pay for supplies furnished under any contract with the directors of the prison until he surrendered such contract and released the state from all liability for such supplies furnished after the leasing of said prison by the Board of Commissioners under an act passed at this session of the legislature. That provision was manifestly adopted upon the supposition that the responsibility for supplies furnished subsequently to the time the prison was received by the lessee, had devolved upon him, and that the contract for the leasing, imposing such responsibility, was valid and binding."

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[11] California v. McCauley (1860), 15 Cal. 429, 457.
[12] People v. Brooks (1860), 16 Cal. 11, 26.

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Hence the provision of the statute of 1859[13] repealing the statute of 1856[14] above referred to, did not and could not abrogate or in any wise impair such lease or the obligation of the state to make the payments thereunder.[15]

Where a statute[16] authorized the funding of the floating debt of San Francisco by exchange for twenty-year ten per cent bonds, known as "city stock," and provided for the collection of an annual tax for the payment of interest on such stock and its retirement at or before maturity, the act must be regarded as authorizing a contract between the city and the holders of such floating indebtedness, and upon exchange by any holder thereof of his old demand for city stock a new and binding contract between the city and such holder arose.[17] Similarly, where the legislature authorized[18] the funding of the floating debt of Sacramento County by exchange for ten per cent bonds, payable not later than ten years after date, and (section 5) required the Court of Sessions to assess annually, in addition to other taxes, a property tax of one-fourth of one per cent to constitute a sinking fund for the redemption of the bonds, the fifth section of the act constituted a contract between the county and those who exchanged their old demands for the bonds.[19] And where a statute[20] consolidating the city and county of Sacramento and providing government therefor, made provision for the levy within the old city limits of a property tax of one dollar on each hundred dollars for city purposes, for the application of certain other revenue to city purposes, for funding the outstanding indebtedness of the city by exchange for six per cent bonds, and for the application of fifty-five per cent of the revenue for city purposes to interest on the bonds and to a sinking fund for their retirement, and such bonds were issued and were accepted by the creditors of the city in payment of their claims, a contract within the constitutional protection between the new municipality and the bondholders resulted.[21]

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[13] Cal. Stats. 1859, p. 374, § 13.
[14] Cal. Stats. 1856, p. 48, c. 39.
[15] People v. Brooks (1860), 16 Cal. 11, 33, 50.
[16] Cal. Stats. 1851, p. 387.
[17] People v. Woods (1857), 7 Cal. 579, 584; People v. Bond (1858), 10 Cal. 563, 570; Board of Education v. Fowler (1861), 19 Cal. 11, 23; Babcock v. Middleton (1862), 20 Cal. 643, 656.
[18] Cal. Stats. 1854, p. 201.
[19] English v. Board of Supervisors (1861), 19 Cal. 172.
[20] Cal. Stats. 1858, p. 267.
[21] Meyer v. Brown (1884), 65 Cal. 583, 589, 26 Pac. 281; Bates v. Porter (1887), 74 Cal. 224, 237, 238, 15 Pac. 732.

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On the other hand, where a statute[22] fixed the San Francisco water front line, granted the use and occupation for ninety-nine years of certain water lots to the city, or where the city had already granted the same, to its grantees, and provided that "the boundary line described . . . . shall be and remain a permanent water front of said city," and that "nothing in this act shall be construed as a surrender by the state of its rights to regulate the construction of wharves and other improvements," and such a prior grantee of a lot that was separated only by an intervening street from the waterline defined in the act, reclaimed his lot and constructed thereon a warehouse, there was no contract between him and the state; and the State Board of Harbor Commissioners were not debarred from afterwards re-establishing the water front further off shore.[23]

Where a statute[24] relating to the incorporation of companies to supply municipalities with water, gave each such company the right to use the public streets and places for its pipes and to condemn private property, on condition that it furnish pure fresh water to the inhabitants at reasonable rates and without discrimination, and to the municipality free of charge "in case of fire or other great necessity," and provided that water rates should be determined annually by a board of commissioners selected, two by the municipal authorities and two by the water company, and in case the four could not agree, the four to choose a fifth member of the board, or if the four could not agree upon the fifth, then the sheriff to appoint the fifth, and the Spring Valley Water Works incorporated under said act, and supplied water to San Francisco and its inhabitants thereunder, a contract was not thereby created which prevented the application to the water company of the provision of Article XIV, section one, of the constitution of 1879, making the board of supervisors of the municipality, in lieu of said board of commissioners, the rate-fixing tribunal.[25]

Rights acquired in the national domain by proceedings to purchase.—The Act of Congress of 1841[26] authorized entry with a Register of a United States district land office of not to exceed a quarter section of United States public lands, by legal subdivisions, when the following conditions concurred:

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[22] Cal. Stats. 1851, p. 307.
[23] Floyd v. Blanding (1879), 54 Cal. 41, 4 Pac. Coast L. J. 424.
[24] Cal. Stats. 1858, p. 218.
[25] Supra, n. 36.
[26] 5 Stats. at L. 453.

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(1) The land must have been surveyed prior to entry, and must not be of certain excepted kinds and classes.

(2) The pre-emptioner must be over twenty-one years of age, a United States citizen, or must have filed his declaration of intention to become one.

(3) The pre-emptioner must not own more than three hundred and twenty acres of land in the United States, and must not have quit or abandoned a residence on his own land, and must not be entitled to any other pre-emptive right.

(4) The pre-emptioner must have made settlement in person on the land he proposes to pre-empt since June 1, 1840, must erect a dwelling and actually reside thereon, and must undertake to improve the same.

Section 11 of the act provided that as between persons equally entitled under the act, the first settler on a given legal subdivision, complying with the act, is entitled to pre-empt. The Act of Congress of 1853[27] as modified by Act of Congress of 1854,[28] made public lands in California, subject to certain provisos, subject to the foregoing act, "with all the exceptions, conditions and limitations thereof." The Act of Congress of 1862[29] extended the privilege of settlement upon unsurveyed lands to California, but required the pre-emptioner to file his declaratory statement within three months after the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement. Under these acts, mere occupation and improvement of United States lands, with intention to pre-empt, did not confer such a vested interest in the land occupied as to impair in any respect the power of Congress to grant it to another, or otherwise dispose of it. The power of Congress ceases only when all the preliminary acts prescribed by the pre-emption laws for the acquisition of title, including payment or offer of payment of the purchase price, have been performed by the settler. Only then, for the first time, the settler acquires a vested interest in the land occupied by him, of which he cannot subsequently be deprived.[30]

By proceedings to exchange.—The Act of Congress of 1897

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[27] 10 Stats. at L. 244.
[28] 10 Stats. at L. 268.
[29] 12 Stats. at L. 409.
[30] Hutton v. Frisbie (1869), 37 Cal. 475, per Sawyer, C. J., Rhodes and Sanderson, JJ., in leading opinion (p. 491), Crockett and Sprague, JJ., dissenting (p. 504), on the ground that occupation and improvement, without payment, created a vested right; The Yosemite Valley Case (Hutchings v. Low) (1873), 15 Wall. 77, 21 L. Ed. 82, affirming Low v. Hutchings (1871), 41 Cal. 634, 638.

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provided[31] "that in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation . . . . the owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his . . . . patent." In the rules and regulations governing Forest Reserves, adopted by the Land Department[32] it was provided that in his application for an exchange of lands under the foregoing act the applicant must "describe the tract selected and the tract covered by the unperfected entry," and that where final certificate or patent has issued the applicant must execute and record a quitclaim deed to the United States of his land within the reserve, and furnish an abstract showing a chain of title from the United States and back again to the United States. Under these provisions, where in June, 1899, a patentee of land within a forest reserve, without selecting a tract in lieu thereof, recorded a quitclaim deed thereof to the United States and filed the same with a sufficient abstract in the United States land office at Visalia, and from that office the papers were forwarded to the commissioner of the general land office, who held them without action until January 3, 1905, and then returned them to the patentee, the patentee never had any contract with the United States, and never obtained a vested right to make a selection of lieu lands under the act of 1897; and the repeal by Act[33] of Congress of 1905 of the provision of the act of 1897 authorizing the exchange, put an end to his right to make the exchange, and his attempt later to select lieu lands was unavailing.[34]

Rights acquired in state lands by proceedings to purchase.—One qualified under the law existing at the time of his application to purchase state land, upon complying with all the requirements of the law and paying for the land and receiving his certificate of purchase, becomes entitled to a patent, and no subsequent constitutional or statutory enactment will be effectual to deprive him of the right so acquired.[35] "Where a valid contract of sale has been entered into pursuant to law between the state and a purchaser so

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[31] 30 Stats. at L. 11.
[32] 24 Land Dec. 589.
[33] 33 Stats. at L. 1264.
[34] Roughton v. Knight (1911), 219 U. S. 537, 55 L. Ed. 569, 31 Sup. Ct. Rep. 297, affirming (1909), 156 Cal. 123, 125, 103 Pac. 834.
[35] Boggs v. Ganeard (1906), 148 Cal. 711, 716, 84 Pac. 195.

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that an equitable interest in the land is vested in the latter, the state will, of course, be prevented by force of familiar constitutional provisions from destroying the right so vested . . . . But where there is no contract and no vested right in the intending purchaser, the withdrawal of the land from sale by repeal of the statute authorizing or otherwise, absolutely terminates the power of the officers of the government to take the steps necessary to transfer title."[36] The mere application to purchase state land, without payment of money, vests no rights in such applicant.[37]

The question as to when an applicant to purchase state land obtains a binding contract with the state and vested rights, has arisen in this state most often with reference to the sale of swamp and overflowed, salt marsh and tide lands. The statute of 1868, relating to the management and sale of lands belonging to the state, provided[38] for the sale of state lands of the class mentioned at one dollar per acre, prescribed the contents of applications to purchase such land and the qualifications of applicants, required applications to be made to the county surveyor, directed the county surveyor, when the land applied for had not been surveyed, to make a survey thereof, and the Surveyor-General to examine such survey when made, and if found correct, approve it, required the applicant within fifty days after such approval to pay to the county treasurer twenty per cent of the purchase price and the first year's interest on the residue, and thereafter to pay such interest annually in advance and the entire residue not later than one year after passage by the legislature of an act requiring payment thereof, and provided that whenever the county treasurer reported to the Register of the State Land Office that the first payment of principal and interest had been made, the Register should issue a certificate of purchase. This act formed the basis of, and provided a scheme essentially similar to that afterwards included in the Political Code, section 3440 of the code being similar to section 28 of the act, and sections 3443-5 of the code to section 29 of the act, except that under the code the original application was filed with the Surveyor-General instead of the county surveyor. Under these provisions, an applicant has no contract with the state, and no vested rights, until his

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[36] Messenger v. Kingsbury (1910), 158 Cal. 611, 615, 112 Pac. 65.
[37] Craycroft v. Superior Court (1912), 18 Cal. App. 781, 786, 124 Pac. 1042.
[38] Cal. Stats. 1867-8, p. 507, 514.

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application is approved and his first payment made.[1] But upon payment of the first installment of purchase money to the proper officers of the state and its acceptance by them, the purchaser's right to the land at once vests in him,[2] provided that at such time the land is open to purchase.[3] The issuance of patent is not necessary to the vesting.[4]

It follows that the provisions of Article XVII, section three, of the Constitution, restricting the sale of public land suitable for cultivation to actual settlers, may be given full force and effect as against an applicant to purchase such land who had not paid any part of the purchase price of his land at the time the Constitution took effect, without impairing any contract obligation or vested right;[5] but has no application where any part of the purchase price had been paid to and accepted by the proper officers of the state at that time.[6] The same is true as touching the provision of Article XV, section two, of the Constitution, reserving a right of way to navigable water, for every public use, over all tide lands

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[1] Eckart v. Campbell (1870), 39 Cal. 256; Klauber v. Higgins (1897), 117 Cal. 451, 459, 49 Pac. 466; Messenger v. Kingsbury (1910), 158 Cal. 611, 615, 112 Pac. 65; Polk v. Sleeper (1910), 158 Cal. 632, 634, 112 Pac. 179; People v. California Fish Company (1913), 166 Cal. 576, 138 Pac. 79.

[2] McCabe v. Goodwin (1895), 106 Cal. 486, 490, 39 Pac. 941, where the early act of 1858, Stats. 1858, p. 198, relating to swamp and overflowed lands was involved, and the purchasers had made all payments; People v. Banning Company (1913), 166 Cal. 635, 638, 138 Pac. 101, where the first payment of 20 per cent only was made and accepted.

[3] Where certain tide lands were within two miles of the town of Wilmington as incorporated February 20, 1872, and disincorporated March 12, 1887, and of San Pedro as incorporated March 1, 1888, but in the interval between the disincorporation of Wilmington and the incorporation of San Pedro were not within two miles of any incorporated city or town, and a would-be purchaser thereof made his first payment March 7, 1882, and his last payment December 24, 1890, and received patent October 16, 1894, but made no payment between March 12, 1887, and March 1, 1888, under Art. XV, § 3, of the Constitution, withdrawing tide lands within two miles of an incorporated city or town from grant or sale, the patent was void. People v. Banning Company (1914), 167 Cal. 643, 645, 140 Pac. 587.

[4] McCabe v. Goodwin (1895), 106 Cal. 486, 490, 39 Pac. 941.

[5] Johnson v. Squires (1880), 55 Cal. 103, 105, 5 Pac. Coast L. J. 620; Urton v. Wilson (1884), 65 Cal. 11, 2 Pac. 411; Manley v. Cunningham (1887), 72 Cal. 236, 242, 13 Pac. 622.

[6] Laugenour v. Shanklin (1880), 57 Cal. 70, 76, 7 Pac. Coast L. J. 140, where a person on July 1, 1852, purchased two certain land warrants from the state, each for 160 acres, for $650 actually paid into the state treasury, and on July 13, 1864, presented to and filed with the locating officer of the state for the Marysville Land District his request (in due form) to purchase certain described land from the state by the location of such land warrants thereon, and at the time of making such request surrendered to the locating agent, in payment for said land, such land warrants.

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fronting on any navigable water;[7] and of Article XV, section three, withholding from grant or sale all tide lands fronting on navigable waters and within two miles of any incorporated city or town of this state.[8]

Moreover, where the Surveyor-General refused to receive or file a certain application to purchase lands between high and low tide lines, which lands could be reclaimed without interference with navigation or fisheries, and did not approve the survey thereof, and the applicant never paid any part of the purchase price, and subsequently[9] section 3443a, withdrawing from sale lands between high and low water, was added to the Political Code, the applicant had no vested right in the lands in question, and their withdrawal from sale absolutely terminated his right to purchase.[10]

And where section 3499 of the Political Code[11] limited the time for initiating and disposing of contests of the right to purchase school lands to five years from the date of issuance of the certificate of purchase, and made the limitation applicable to pending as well as future contests, the application of the amendment so as to quash a pending contest, brought by a contestant who had not paid any part of the purchase price of the land in question, is proper; he has no vested right to be protected.[12]

On the other hand, where a statute[13] relating to the sale of land inuring to the state through the recession or drainage of the waters of inland lakes, provided that the selling price thereof should be

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[7] People v. California Fish Company (1913), 166 Cal. 576, 588, 613, 138 Pac. 79, where application to purchase certain tide lands was made before the Constitution of 1879 took effect, but the first instalment of purchase money was not paid until March 5, 1880, and the court held the purchase subject to Art. XII, § 2, of the Constitution.

[8] People v. Banning Company (1913), 166 Cal. 635, 638, 138 Pac. 101, where the application to purchase and survey was approved and the first payment on the purchase price paid to and accepted by the proper officers February 28, 1888, and San Pedro was not incorporated until March 1, 1888, a binding contract arose before the incorporation of the city which the state was bound to complete; People v. Banning Company (1914), 167 Cal. 643, 645, 140 Pac. 587.

In Klauber v. Higgins (1897), 117 Cal. 451, 463, 49 Pac. 466, a statute similar to Art. XV, § 3, Stats. 1869-70, p. 875, amendatory of § 70 of Stats. 1867-8, p. 507, was passed after an application to purchase tide lands within two miles of San Diego city had been made, and before the application was approved or first payment made; and a subsequent attempt on the part of the officers of the state to complete the sale, and the patent issued in pursuance thereof, were held void.

[9] Cal. Stats. 1909, p. 774.

[10] Messenger v. Kingsbury (1910), 158 Cal. 611, 615, 112 Pac. 65.

[11] As amended by Cal. Stats. 1911, p. 345.

[12] Craycroft v. Superior Court (1912), 18 Cal. App. 781, 786, 124 Pac. 1042.

[13] Cal. Stats. 1893, p. 341.

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"paid into the school fund of the county where the land lies," and that if the reclamation of land sold was necessary, all provisions of law regulating the reclamation of swamp and overflowed lands should apply, and the law so referred to provided [14] that upon the completion of the reclamation works the purchase price of the land within the reclamation district should,—subject to certain deductions,—be repaid to the purchasers, the provision for such repayment constituted a contract between purchasers and the state which the state could not disregard.[15]

Franchise rights.—A franchise is, in the grantee thereof, a vested right of property, subject, however, in most cases, to the performance of conditions upon the part of the grantee, and so long as these are performed, cannot be divested, or transferred to another, by legislative authority, the grantee not consenting.[16]

Thus to the extent that a telegraph corporation, by constructing, maintaining and operating telegraph lines along and upon public streets in Los Angeles city, accepted the grant contained in section 536 of the Civil Code, which provided: "Telegraph corporations may construct lines of telegraph along and upon any public road or highway, along or across any of the waters or lands within this state, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters;" it secured a vested right, subject only to the proper exercise of the police power.[17]

Where a gas company by constructing and operating in a portion of Los Angeles city gas works and a distributing system of much larger capacity than requisite to supply the territory then reached and of so great size that they could not be operated profitably without contemplated extensions into other territory, and by supplying gas light to inhabitants in territory then reached, and contracting to supply it to inhabitants not then reached, had accepted as to all streets necessary to serve the whole city the franchise offered by Article XI, section nineteen,[18] of the state consti-

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[14] Cal. Pol. Code, § 3477.

[15] McCord v. Slavin (1904), 143 Cal. 325, 331, 332, 76 Pac. 1104.

[16] Fall v. Sutter County (1862), 21 Cal. 238, 252; California State Telegraph Co. v. Alta Telegraph Co. (1863), 22 Cal. 398, 422, 425, 429.

[17] Western Union Telegraph Co. v. Hopkins (1911), 160 Cal. 106, 119, 116 Pac. 557.

[18] Before the amendment of 1911 this provided: "In any city where there are no public works owned and controlled by the municipality for

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tution, the grant, resulting from the acceptance, constituted a contract, and vested in the company a property right, protected by the Federal Constitution, which the state could not take away by the amendment of 1911 to said constitutional provision.[19]

Where, however, a franchise to construct and maintain a bridge and collect tolls thereon for twenty years is not by its terms exclusive, it does not divest the legislature of all power to grant a similar franchise to any other person in the same vicinity, and the grantee does not have the right to insist that no franchise of like kind the effect of which will be to impair the value and take away the profits of his own shall be granted, nor to insist that the public authorities shall not build a free bridge with similar effect.[20]

And where at the time a cable railroad was constructed in Los Angeles city pursuant to a franchise therefor, it was provided in section 499 of the Civil Code that, "Two lines of street-railway, operated under different managements, may be permitted to use the same street, each paying an equal portion for the construction of the track and appurtenances used by said railways jointly," the reservation of section 499 entered into the contract of the cable company, and it did not have any exclusive right to the portion of the street in which its road was constructed, and a subsequent grant of franchises for an electric road, extending for three blocks over the route of the cable road, and the entry by the electric road into joint use of the tracks of the cable road on such three blocks

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supplying the same with water or artificial light, any individual or . . . . company . . . . shall . . . . have the privilege of using the public streets . . . . thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with . . . . illuminating light, or with fresh water . . . . upon the condition that the municipal government shall have the right to regulate the charges thereof."

[19] Russell v. Sebastian (1914), 233 U. S. 195, 58 L. Ed. 912, 34 Sup. Ct. Rep. 517, Ann. Cas. 1914C 1282, reversing Matter of Russell (1912), 163 Cal. 668, 676, 126 Pac. 875, Ann. Cas. 1914A 152, where it had been held that the acceptance extended only to streets actually occupied when the amendment of 1911, repealing the state's offer theretofore contained in Art. XI, § 19, took effect; Oro Electric Corporation v. Railroad Commission (1915), 169 Cal. 466, 480, 147 Pac. 118.

Where on October 10, 1911, when the amendment to Art. XI, § 19, of the state constitution was approved, a corporation engaged in supplying the inhabitants of San Francisco with gas and electric light had pipes and conduits for that purpose in various public streets of the municipality, including 6th Street between Stevenson and Jessie, it on said day had a vested right to occupy such part of the street for the purpose specified in § 19, and subject to the limitations therein contained. Matter of Application of Keppelmann (1914), 166 Cal. 770, 773, 138 Pac. 346.

[20] Fall v. Sutter County (1862), 21 Cal. 238, 252.

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was not a taking of private property for public use and did not involve an exercise of the power of eminent domain.[21]

V. Rights of Individuals in Specific Property.

Power of testamentary disposition.—The power of testamentary disposition is not an essential incident of property; and the legislature can, without depriving a husband of any vested right of property, take from him testamentary power with reference either to the community or his separate property.[22]

Property by succession.—The right of an heir to his inheritance depends upon positive law, and is not a natural or absolute right; and it is competent for the legislature to change the rule of inheritance, to restrict the testamentary power, and to provide that the heir or devisee shall take subject to certain burdens, such, for instance, as the payment of the decedent's debts or a family allowance.[23] Statutes of descent are always subject to legislative control and may be changed or abolished at will, because the right of descent, being a mere expectancy, is not a vested right.[24] But upon the death of an ancestor the heir or devisee becomes at once vested with the full property, subject only to liens and burdens then existing or created by statutes then in force, and to the temporary right of possession of the executor or administrator. The legislature has no power thereafter to divest it, as by an enactment ordering the sale of property of a decedent for a purpose other than one for which the sale was authorized at the time of the decedent's death.[25]

Thus, as the Probate Act of 1851 authorized a sale of a decedent's real estate by his personal representative only when the personal estate in his hands was "insufficient to pay the allowance to the family and all debts and charges of the ad-

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[21] Pacific Railway Co. v. Wade (1891), 91 Cal. 449, 27 Pac. 768, 25 Am. St. Rep. 201, 13 L. R. A. 754.

[22] Spreckels v. Spreckels (1897), 116 Cal. 339, 48 Pac. 228, 58 Am. St. Rep. 170, 36 L. R. A. 497.

[23] Brenham v. Story (1870), 39 Cal. 179; In re Porter's Estate (1900), 129 Cal. 86, 61 Pac. 659, 79 Am. St. Rep. 78.

[24] Hannon v. Southern Pacific R. R. Co. (1909), 12 Cal. App. 350, 107 Pac. 335.

[25] Brenham v. Story, supra, n. 23; In re Packer's Estate (1899), 125 Cal. 396, 58 Pac. 59, 73 Am. St. Rep. 58; In re Porter's Estate, supra, n. 23; In re Newlove's Estate (1904), 142 Cal. 377, 75 Pac. 1083; In re Patterson's Estate (1909), 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, 26 L. R. A. (N. S.) 654, 18 Ann. Cas. 625.

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ministration,"[26] a subsequent statute[27] authorizing the administrator of the estate of one Charles White (who died in 1853) to sell at public or private sale, subject to confirmation by the probate judge "as he may deem just and proper and for the interest of said estate," all or any of the real property of the decedent as in his judgment "will best promote the interest of those entitled to the estate," is invalid to authorize a sale for any purpose other than those specified in the Probate Act.[28] The amendment, to Section 1536 of the Code of Civil Procedure,[29] passed in 1893, authorizing a sale of real property of a decedent for the reason, additional to those theretofore recognized, that it is for the advantage, benefit and best interests of the estate and those interested therein, cannot apply in the administration of the estate of a decedent who died before the passage of the amendment;[30] but as to estates of those who die thereafter, it is in full force and effect.[31]

Where one died in 1879, leaving personal property, a note and mortgage subject to sale in the administration of his estate if "for the best interests of the estate,"[32] whether the sale was necessary to pay debts or not, and by subsequent proceedings in the course of administration such personal property was converted into real property by foreclosure of the mortgage security and the buying in of the mortgaged property, said property was not thereby relieved of the burden of being subject to sale if "for the best interests of the estate." Consequently when by a subsequent amendment[33] its sale on that ground was authorized, said land might be sold pursuant to the power thereby conferred, without interference with any vested right.[34]

Community property.—Under a statute of 1850 defining the property rights of husband and wife,[35] the husband was given by Section 9 "the entire management and control of the common property, with the like absolute power of disposition as

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[26] Cal. Stats. 1851, p. 448, 467.
[27] Cal. Stats. 1860, p. 148, as amended by Cal. Stats. 1861, p. 152.
[28] Brenham v. Story, supra, n. 23.
[29] Cal. Stats. 1893, p. 212.
[30] In re Packer's Estate, supra, n. 25; In re Freud's Estate (1901), 131 Cal. 667, 63 Pac. 1080, 82 Am. St. Rep. 407; In re Newlove's Estate, supra, n. 25.
[31] In re Porter's Estate, supra, n. 23.
[32] Cal. Code Civ. Proc., § 1523.
[33] Cal. Stats. 1893, p. 212.
[34] In re Bazzuro's Estate (1911), 161 Cal. 71, 118 Pac. 434.
[35] Cal. Stats. 1850, p. 254.

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of his own separate estate." Section 11 declared: "Upon the dissolution of the community by the death of either husband or wife, one-half of the common property shall go to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, the whole shall go to the survivor, subject to such payment." The provisions of section 11 were amended in 1861 so that in case of the death of the wife the husband took all the community property, while in case of the death of the husband the wife took but half as before, and the other half went to certain of his heirs subject to his right of testamentary disposition.[36] The details of this plan were later changed in minor particulars.[37] The scheme as thus developed was carried substantially into the Civil Code.[38]

Under these provisions, it has been held that the wife's interest in the community property, during coverture, is not vested, but is a mere expectancy like that of an heir in the property of his ancestor;[39] but upon the husband's death, vests.[40] It is further said that upon the dissolution of the marriage by judicial decree making no mention of property, she becomes vested with one half of the community property as cotenant with her husband.[41]

On the other hand, it has been held that the husband's interest in the community property is at all times vested.[42] Thus section 172 of the Civil Code, giving the husband management and control and absolute power of disposition of the community property, was amended in 1891 by the addition of the following pro-

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[36] Cal. Stats. 1861, p. 310.

[37] Cal. Stats. 1863, p. 363.

[38] § 172 contains a provision like that of § 9 of the act of 1850, and §§ 1401 and 1402 contain provisions like those of § 11 as amended in 1864.

[39] Van Maren v. Johnson (1860), 15 Cal. 308; Packard v. Arellanes (1861), 17 Cal. 525; Greiner v. Greiner (1881), 58 Cal. 115, 8 Pac. Coast L. J. 119; People v. Swalm (1889), 80 Cal. 46, 22 Pac. 67, 13 Am. St. Rep. 96; In re Burdick's Estate (1896), 112 Cal. 387, 44 Pac. 784; In re Moffitt's Estate (1908), 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N.S.) 207.

[40] Packard v. Arellanes, supra, n. 39.

[41] In re Burdick's Estate, supra, n. 39.

[42] Van Maren v. Johnson, supra, n. 39; Packard v. Arellanes, supra, n. 39; Greiner v. Greiner, supra, n. 39; People v. Swalm, supra, n. 39; Spreckels v. Spreckels, supra, n. 22, where it was said: "The husband's ownership of one-half of the community estate is in a sense conditional. It may terminate upon the happening of a possible event. Until then, he is, however, absolute owner as defined in the code."

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viso: "provided,however, that he cannot make a gift of such community property, or convey the same without a valuable consideration, unless the wife in writing consent thereto."[43] It was held that to apply the amendment to community property acquired prior to its passage would be to deprive the husband of a vested right of property, and is beyond legislative power.[44] The following additional proviso was added in 1901: "provided, also, that no sale, conveyance, or incumbrance of the furniture, furnishing and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the consent of the wife."[45] It is clear that this amendment has no application to community property acquired before such amendment.[46]

Again, it has been held by four justices of the Supreme Court that the husband upon the death of the wife takes all, and (two justices dissenting) that the wife upon the death of the husband takes her share of the community property by succession and not survivorship.[47]

The only extended argument in the decisions in support of the foregoing views is that in Spreckels v. Spreckels,[48] as follows:

> "Prior to the amendments of 1891 the code vested in the husband, with reference to the community property, all the elements of ownership, and in the wife none. . . .
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> "As to all the world except the wife, there was, prior to this amendment, no distinction between the community estate and the separate estate of the husband. If suit were brought upon a liability incurred in a business, the profits of which would be community property, and judgment recovered, execution could be levied upon the separate estate of the husband and the debt entirely satisfied therefrom. His separate estate, during the entire marriage, is liable to be taken for community debts, and of course furnishes a credit in aid of community business. If the community loses, the loss may fall upon his separate estate, but his separate estate cannot profit by the success of the community.
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> "The separate property of the wife is exempt from all

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[43] Cal. Stats. 1891, p. 425.
[44] Spreckels v. Spreckels, supra, n. 22; Clavo v. Clavo (1909), 10 Cal. App. 447, 102 Pac. 556, 36 L. R. A. (N. S.) 1041.
[45] Cal. Stats. 1901, p. 598.
[46] Duncan v. Duncan (1907), 6 Cal. App. 404, 92 Pac. 310.
[47] In re Burdick's Estate, supra, n. 39.
[48] Spreckels v. Spreckels, supra, n. 22.

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these liabilities, but, on the other hand, the community property is liable for debts incurred by the husband in the management of his separate estate.

"Now, all these differences point to the fact that the husband is the absolute owner of the community property. . . .

"If the property did not belong to the husband, there would be no occasion for a law limiting his testamentary power with reference thereto."

This argument leaves out of account several important considerations. The community property is the result of the industry and frugality not only of the husband but of the wife as well. In case the husband exercises his power of absolute disposition, the proceeds, if any, belong to the community. When he engages in business enterprise, it certainly is only fair that he should be willing and required to take the same risk with respect to his own separate property that he takes with respect to property to the accumulation of which the industry and frugality of another has contributed; he certainly should not take with property to which another has so contributed, a risk he is unwilling to take with his own. In the language of the code, the husband has only, as touching the community property, "entire management and control . . . . with . . . . absolute power of disposition:" he does not have those most important elements of ownership, exclusive use, possession and enjoyment. In fact, the words just quoted, in which his power is expressed, are appropriate to the vesting in him of a power, not an estate. That he has such a power in the community property, but that the estate therein is vested in his wife equally with himself, is the only view that is entirely consistent with section 682 of the Civil Code which provides:

"The ownership of property by several persons is either:
1. Of joint interests;
2. Of partnership interests;
3. Of interest in common;
4. Of community interest of husband and wife."

As said by two justices of the Supreme Court, concurring in a judgment, but dissenting on the point to which the statement was directed:[49]

"The entire provisions of the Civil Code are at variance with treating the husband as the owner of the community

[49] Per Harrison and Garoutte, J J., concurring in judgment in re Burdick's Estate, supra, n. 39.

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> property. If he were the owner he would have the absolute dominion over it, with the right to use it or dispose of it according to his pleasure; but . . . . these attributes of ownership are denied him. Section 682 of the Civil Code specifies the community interest of husband and wife as one species of property which is owned by several persons. The necessary implication therefrom is that the husband and the wife are the 'several persons' in whom is vested this ownership of the community property. This ownership is not absolute in either, but in each of them is qualified by reason of its being shared with the other."

Other intimations and statements in line with the same view may also be found in the cases.[50] In this view, the relation of husband and wife with reference to the community property is like that of a general to a special partner.

But, finally, in any view of the points already discussed, so far as concerned community property accumulated while section 11 of the act of 1850 as originally enacted was in force, the husband had no valid constitutional objection to that clause which took from him, in certain cases, upon his wife's death, one-half of the community property; he held all such property subject to the law in force when it was accumulated.[51]

Corporeal property: (a) *Regulating use in general.*—The

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[50] In De Godey v. Godey (1870), 39 Cal. 157, Wallace, Sprague, Crockett and Temple, J J., in leading opinion, said: "It is true that the interest of the wife therein pending the marriage has been termed 'a mere expectancy' . . . . ; but while, perhaps, no other technical designation would so nearly define its character, it is, at the same time, an interest so vested in her as that the husband cannot deprive her of it by his will . . . . nor voluntarily alienate it for the mere purpose of divesting her of her claims to it."

Other cases, also declare that a voluntary conveyance by a husband of the common property, or any portion of it, for the purpose of defeating the claims of the wife, will not be sustained. Smith v. Smith (1859), 12 Cal. 216; Peck v. Brummagim (1866), 31 Cal. 440, 89 Am. Dec. 195; Lord v. Hough (1872), 43 Cal. 581.

It has also been debated whether or not a wife during coverture can maintain an action to set aside such a fraudulent transfer of community property by the husband. In Greiner v. Greiner, supra, n. 42, Morrison, C. J., and Myrick, J., concurring in the judgment, affirmed the right of the wife so to do; Thornton and Sharpstein, J J., in the leading opinion denied her right so to do until a dissolution of the marriage. In Cummings v. Cummings (1887), 2 Cal. Unrep. Cas. 774, 14 Pac. 562, Thornton, J., writing the opinion of Dep't. 2, again denied this right; but a rehearing was granted, and in the opinion on rehearing by McKinstry, J., (1888), 75 Cal. 434, 17 Pac. 442, this question was not considered. In Duncan v. Duncan, supra, n. 46, the District Court of Appeal hazarded the opinion that it was possible that under some circumstances such an action might be maintained.

[51] Packard v. Arellanes, supra, n. 39.

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legislature cannot declare the usual and ordinary use of property a nuisance, when such use infringes no one's legal rights.[52] An ordinance which prohibits the use of land and appurtenances in a lawful business in an innocent manner, must be declared void as an unwarranted infringement of inalienable rights of property.[53]

(b) *Use as between adjoining owners.*—The fact that a certain use of one's land will obstruct the light and air of an adjoining landowner, does not render it competent for the legislature to give such adjoining landowner the right to prevent it.[54]

(c) *Use where subject to easement of way.*—Where title to a public street of a city, subject to the public easement, is in the owners of the abutting land, any such owner, subject to reasonable regulation to insure the least interruption of the public easement, has a vested right to lay a waterpipe for his own use under the street and to make the necessary excavation therein for such, or any other, legitimate purpose that does not impede the public use.[55]

(d) *Changing joint tenancy to tenancy in common.*—A statute[56] passed in 1855 providing: "Every interest in real estate granted or devised to two or more persons, other than executors and trustees as such, shall be a tenancy in common unless expressly declared in the grant or devise to be a joint tenancy," thereby reversing the rule theretofore prevailing, did not destroy the joint tenancy created by a deed to two grantees, made in 1853.[57]

(e) *Creating liens by operations of law.*—A statute[58] authorizing the distraint of trespassing hogs in certain counties at certain seasons of the year, and creating a lien thereon for the damage done and the cost of keeping them and of enforcing the lien, is not in excess of legislative power.[59]

While the validity of various provisions of the Mechanics'

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[52] Western Granite & Marble Co. v. Knickerbocker (1894), 103 Cal. 111, 37 Pac. 192.

[53] Abbey Land & Improvement Co. v. San Mateo County (1914), 167 Cal. 434, 139 Pac. 1068.

[54] Western Granite & Marble Co. v. Knickerbocker, supra, n. 52.

[55] Colegrove Water Co. v. Hollywood (1907), 151 Cal. 425, 90 Pac. 1053, 13 L. R. A. (N. S.) 904.

[56] Cal. Stats. 1855, p. 171.

[57] Dewey v. Lambier (1857), 7 Cal. 347.

[58] Cal. Stats. 1857, p. 106.

[59] Rood v. McCargar (1874), 49 Cal. 117.

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Lien Law has at times been questioned, the latest decisions sustain in its entirety the law as amended in 1911.[60]

[60] In Hicks v. Murray (1872), 43 Cal. 515, the court held not constitutionally objectionable the provision of section 1 of Cal. Stats. 1867-8, p. 589, the Mechanics' Lien Law of 1868, that every person "having charge of any mining, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, ... shall be held to be the agent of the owner for the purposes of this act;" also the provision of section 3 that "all liens created by this act upon any building or other improvement shall be preferred to all prior liens, mortgages, or other encumbrances upon the land upon which said building or other improvement shall have been constructed, or situated when altered or repaired." In Latson v. Nelson (1883), 2 Cal. Unrep. Cas. 199, 11 Pac. Coast L. J. 589, it was declared that the inalienable rights of property would lose much of their force should the court sustain the provision of section 1183 of the Code of Civil Procedure, as amended by Cal. Stats. 1880, p. 62, that the liens therein declared in favor of mechanics, materialmen, artisans, architects and laborers, "shall not be affected by the fact that no money is due, or to become due, on any contract made by the owner with any other party." In Gibbs v. Tally (1901), 133 Cal. 373, 65 Pac. 970, 60 L. R. A. 815, it was stated that where a landowner enters into a valid contract for the improvement of his land, the most the legislature can do is to cause the contract price to be applied to the payment of the demands of those furnishing labor and materials to the contractor. The contract price cannot be exceeded. In Hampton v. Christensen (1906), 148 Cal. 729, 84 Pac. 200, it was said that if the provisions of section 1184 of the Code of Civil Procedure, as amended by Cal. Stats. 1887, p. 152, should be construed as denying the owner the right, before applying, in satisfaction of liens, the payment due under that section upon the completion of a building contract, to deduct therefrom the cost of remedying defects in the performance of the contract and the damages to which under the contract he is entitled for delay in the completion of the contract, it is indubitably void. In Stimson Mill Co. v. Nolan (1907), 5 Cal. App. 754, 91 Pac. 262, in which case a rehearing was denied by the Supreme Court, it was, however, declared that where a landowner causes another to create a structure on his land, it becomes a part thereof charged with the liens of the laborers and materialmen who created it, that it having by his own act become a part of his land, it is not inequitable nor destructive of his rights to say that the liens should also extend to the land necessary for the use of the structure, and that it is no infringement upon any existing right of property to require the owner to pay to the laborer or materialman for the work or materials bestowed in the creation of the structure which he procured, the full value thereof. Finally, in Roystone Co. v. Darling (1915), 171 Cal. 526, 154 Pac. 15, it was held that, considered as a whole, Cal. Stats. 1911, p. 1313, relating to the liens of mechanics and others upon real property, removing the restrictions as to the time of payment of the contract price of original construction contracts first introduced by amendment by Cal. Stats. 1885, p. 143, to section 1184 of the Code of Civil Procedure, providing that the liens of others than original contractors shall be limited only by the reasonable value and contract price of labor and materials furnished by them, irrespective of the state of accounts between the owner and original contractor, unless before the commencement of work, the original contractor, together with a bond with sureties in an amount not less than 50 per cent of the contract price of said contract, and conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work contracted for, be filed in the County Recorder's office, in which event the recovery on liens must be limited to the amount due from the owner to the original contractor, was valid.

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(f) *Requiring notice to avoid liens.*—There is no doubt of the power of the legislature to enact that part of the Mechanics' Lien Law of 1868,[61] which provided that in case of the construction, alteration or repair of any improvement upon land with the knowledge of the owner of claimant of any interest therein, his interest shall be subject to the liens created by the act, unless within three days after he obtains knowledge of the work, or intended work, he posts written notice that he will not be responsible for the same in a conspicuous place upon said land or the improvements thereon.[62] With modifications in detail, section 1192 of the Code of Civil Procedure[63] has been the equivalent of this provision of the statute of 1868.

(g) *Recording laws.*—A provision of a statute of 1850 requiring conveyances of real estate theretofore made to be recorded, and making void any such conveyance when unrecorded as against any subsequent purchaser in good faith for value whose own conveyance is first recorded,[64] does not impair vested rights, notwithstanding recording was not theretofore required, it being proper to require a transferee of land to take precautions for the protection of innocent third persons from his own omission.[65]

Where, by a statute of 1851 protecting the homestead from forced sale except in certain enumerated cases, no declaration of homestead was requisite,[66] but by a statute of 1860 a declaration, written, acknowledged and recorded, was required in the creation of new homesteads, it was held that there was no constitutional objection to a statute[67] of 1862, also requiring such a declaration in case of homesteads arising before the act of 1860 took effect, and providing that any homestead not so declared shall cease from and after June 1, 1862.[68]

(h) *Requiring owner to prove his title.*—The Act of Congress of 1851[69] is not open to constitutional objection[70] in requiring

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[61] Cal. Stats. 1867-8, p. 589.
[62] Fuquay v. Stickney (1871), 41 Cal. 583; Hicks v. Murray (1872), 43 Cal. 515.
[63] Since the amendment by Cal. Stats. 1873-4, p. 409.
[64] Cal. Stats. 1850, p. 249.
[65] Stafford v. Lick (1857), 7 Cal. 479.
[66] Cal. Stats. 1851, p. 296.
[67] Cal. Stats. 1862, p. 519.
[68] Noble v. Hook (1864), 24 Cal. 638.
[69] (March 3, 1851), 9 U. S. Stats. at L. 631.
[70] Estrada v. Murphy (1861), 19 Cal. 248.

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every claimant of land in California by Spanish or Mexican grant to present to the land commissioners constituted by the act, the documentary and oral evidence on which he relies to sustain his claim, and in providing "that all lands, the claims to which have been finally rejected . . . . and all lands the claims to which shall not have been presented to said commissioners within two years after the date of this act, shall be deemed . . . . part of the public domain of the United States," as against the claimant of a grant by imperfect title, as where the grant was of a specified quantity of land to be thereafter laid off by public authority within a much larger tract.

(i) *Extending protection to mere occupant of land.*—The provisions of a statute[71] of 1856 passed for the protection of actual settlers on land which declared that in actions to recover land wherein plaintiff claims by federal or state patent or Spanish or Mexican grant, the defendant shall, unless his possession was obtained by force or fraud or as tenant or by entry upon inclosed lands claimed under Spanish or Mexican grant or such grant had been surveyed, and the grant, plat and field notes recorded, and the boundaries marked so as to be easily and certainly known, be entitled to set off the value of improvements made by him and of his growing crops, and that plaintiff must pay defendant such value or forfeit the land to him, are unconstitutional.[72] A statute of 1858, providing that any person heretofore or hereafter ousted from the possession of any land by a writ of restitution issued against him in an action wherein the prevailing party claimed under a foreign grant, afterwards finally rejected, or finally located so as not to include such land, is entitled, in a subsequent action against such party and those succeeding him in the possession of such land, to recover the possession of such land, and from the party by whom he was ousted his costs and damages by reason of the ouster, and from those in possession since the ouster the rents and profits of the land during the time that each was in possession,[73] is unconstitutional.[74]

(j) *Authorizing entry for mining on land held by mere occu-*

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[71] Cal. Stats. 1856, p. 56.

[72] Billings v. Hall (1857), 7 Cal. 1; Lathrop v. Mills (1861), 19 Cal. 514.

[73] Cal. Stats. 1858, p. 345.

[74] Rich v. Maples (1867), 33 Cal. 102, where defendant, the holder of a Mexican grant of two leagues within a larger tract, had ousted plaintiff from the possession of a part of the larger tract not included within the grant as finally segregated.

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pancy.—A statute of 1855 made it a misdemeanor for any person for mining purposes to injure, undermine, or destroy any growing crops of grain or garden vegetables, house, building, or other superstructure, or fruit trees, the property of another upon mineral lands, without first giving such other a bond with sureties, approved by the justice of the peace of the township, in an amount to be fixed as by the act provided, and conditioned for the payment of all damages sustained by the obligee from such mining.[75] In so far as this attempted to authorize one who had complied with its provisions to enter upon a tract of public mineral land of the United States, enclosed and cultivated to fruit trees and garden vegetables by the person in possession it was held to be unconstitutional.[76]

(k) *Requiring bond to secure payment for labor and materials bestowed in improvement upon land.*[77]

Easements—access to and egress from public ways.—The right of the owner of a city lot to the use of the adjacent street for access to and egress from his lot is a right of property incident to the lot itself, whether he has the fee or only an easement in the street.[78] But in a public highway in the country no abutter has any private easement of way as distinguished from his interest

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[75] Cal. Stats. 1855, p. 145.

[76] Gillan v. Hutchinson (1860), 16 Cal. 154.

[77] In Gibbs v. Tally, supra, n. 60, it was held that section 1203 of the Code of Civil Procedure, as enacted by Cal. Stats. 1893, p. 202, requiring the filing in the County Recorder's office with each building contract required to be filed therein, of a bond with sureties, in the amount of 25 per cent of the contract price of the building contract, made to inure to the benefit of all persons performing labor or furnishing materials in pursuance of the building contract, providing that the persons in whose favor the bond is required may sue thereon without prejudice to their rights to liens, and making the owner and contractor jointly and severally liable in damages for the loss occasioned to anyone by a failure to file the bond, in effect required the owner to give the bond, no penalty in reality being visited upon the contractor for a failure to give it, he already being liable for all labor and materials furnished, and thus placed an additional burden upon the owner, and prevented him from improving his property without assuming such burden, and therein placed an unreasonable restraint upon him in the use thereof, and thus to some extent deprived him of it, and so was invalid. But in Roystone Co. v. Darling, supra, n. 60, it was held that the requirement of section 1183 of the Code of Civil Procedure, as amended by Cal. Stats. 1911, p. 1313, section 1, of a somewhat similar bond, in the amount of 50 per cent of the contract price of the building contract,—unlimited recovery on liens claimed, irrespective of the state of accounts between the owner and contractor being permitted where the bond was not given,—was not open to constitutional objection.

[78] Schaufele v. Doyle (1890), 86 Cal. 107, 24 Pac. 834; Eachus v. Los Angeles Consol. Electric Ry. Co. (1894), 103 Cal. 614, 37 Pac. 750,

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in the common public easement. There is no covenant in favor of any abutter that it shall always exist, and so the road can be closed without making him compensation inasmuch as he has no private interest in it.[79]

Homesteads.—The first enactment in this state concerning homesteads was a statute passed in 1851.[80] Applying this statute, and reversing former decisions, the Supreme Court, in the fall of 1859, held that notwithstanding the occupation of premises as a homestead, whether common property or the separate property of the husband, all the estate remained in the husband, a joint tenancy was not created, and the wife had no estate therein.[81]

The amendatory act of 1860 immediately followed.[82] By section 1 of this act, amendatory of section 2 of the act of 1851, and in force until superceded by the codes, it was declared that husband and wife held their homestead "as joint tenants;" and by section 1265 of the Civil Code, as enacted in 1872, it was declared they held it "in joint tenancy." By the amendment of 1873 both these phrases were omitted.[83]

At all times the homestead law has also specifically set forth the devolution of the homestead upon the death of one spouse. By section 10 of the act of 1851, it was provided that upon the death of the husband, the homestead should be set apart in certain cases by the probate court for the benefit of his surviving wife, children and heirs. By section 4 of the act of 1860, amendatory of said section 10, it was provided that upon the death of either spouse, the homestead should be set apart by such court for the benefit of the survivor, if any, and in certain cases, of the children also. This provision was again amended in 1862 to provide that upon the death of either spouse the homestead "vests absolutely in the survivor," and so remained until the codes.[84]

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42 Am. St. Rep. 149; Bigelow v. Ballerino (1896), 111 Cal. 559, 44 Pac. 307; Coats v. Atchison, Topeka & Santa Fe Ry. Co. (1905), 1 Cal. App. 441, 82 Pac. 640.

[79] Levee District No. 9 v. Farmer (1894), 101 Cal. 178, 35 Pac. 569, 23 L. R. A. 388, the court saying: "If it were otherwise no public road would be vacated so long as it could be shown that it was necessary for a single abutter, and thus the public could be required to maintain what is in fact a private way."

[80] Cal. Stats. 1851, p. 296.

[81] Gee v. Moore (1859), 14 Cal. 472.

[82] Cal. Stats. 1860, p. 311.

[83] Code Amendments, 1873-4, p. 181.

[84] Cal. Stats. 1862, p. 519.

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On this point section 1265 of the Civil Code as enacted 1872 declared of the homestead:

> "On the death of either of the spouses . . . . it descends to and the title at once vests in the survivor,"

and section 1474 of the Code of Civil Procedure as enacted 1872 declared:

> "On the death of the husband or wife (it) vests absolutely in the survivor."

Section 1265 was amended[85] in 1873 to provide:

> "If the selection was made by a married person from the community property, the land, on the death of either of the spouses, vests in the survivor . . . . ; in other cases, upon the death of the person whose property was selected as a homestead, it shall go to their heirs or devisees, subject to the power of the probate court to assign the same for a limited period to the family of the decedent."

Section 1474 was amended in 1880[86] to provide:

> "If the homestead . . . . was selected from the community property or from the separate property of the person selecting or joining in the selection of the same, it vests, on the death of the husband or wife, absolutely in the survivor. If the homestead was selected from the separate property of either the husband or the wife, without his or her consent, it vests, on the death of the person from whose property it was selected, in his or her heirs, subject to the power of the superior court to assign it for a limited period to the family of the decedent."

Other more recent amendments to sections 1265 and 1474 are not material to the present discussion.

It was early decided that the interest which, by the act of 1860, the children of a marriage took in the family homestead upon the death of one parent, was taken by inheritance.[87] During the joint lives of their parents, they had no vested interest in the homestead.[88] Thus where husband and wife declared a homestead while the act of 1860 was in effect, and the husband did not die until after the act of 1862 took effect, which made no provision for the children sharing in the homestead, the latter act applied; the homestead vested absolutely in the surviving wife, and the children of the marriage took nothing in the homestead.[89]

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[85] Cal. Stats. 1873, p. 181.
[86] Cal. Stats. 1880, p. 77.
[87] Rich v. Tubbs (1871), 41 Cal. 34; Levine v. Rovegno (1886), 71 Cal. 273, 12 Pac. 161.
[88] Herrold v. Reen (1881), 58 Cal. 443, 8 Pac. Coast L. J. 961.
[89] Rich v. Tubbs, supra, n. 81; Herrold v. Reen, supra, n. 88.

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In case of husband and wife, however, the question of vested rights is more complicated, and different questions arise accordingly as the homestead was declared between April 28, 1860 and July 1, 1874, when husband and wife are spoken of as joint tenants in the homestead or their interest as a joint tenancy, or before or after that period.

It must be said, however, that in most of the decisions the Supreme Court gives only cursory consideration to these questions, and pays little or no attention to the changes in statutory language. Thus it is said generally in several cases that the law in force at the death of a spouse, and not that in force at the time of the declaration of homestead, controls the rights of the surviving spouse.[90] It has also been held that the homestead act as amended in 1860 was a statute of descent.[91] And in two cases where a homestead was declared while the act of 1862 was in force, but a spouse did not die until after the codes took effect, it was held that they, and not the statute of 1862, governed the devolution of the homestead.[92]

The only two cases wherein the questions of vested rights have been considered at length remain to be noticed. They were decided respectively in 1877 and 1909. In both the declaration of homestead was made while the codes as enacted in 1872 were in effect. In the first both spouses joined in a declaration of homestead on separate property of the husband, and the husband died August 1875; in the second the wife alone declared on separate property of the husband, and he died October 1885. In the former case it was held that her rights vested immediately upon the

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[90] Tyrrell v. Baldwin (1889), 78 Cal. 470, 21 Pac. 116; Gruwell v. Seybolt (1889), 82 Cal. 7, 22 Pac. 938; Estate of Fath (1901), 132 Cal. 609, 64 Pac. 995; Saddlemire v. Stockton Sav. & Loan Soc. (1904), 144 Cal. 650, 79 Pac. 381.

[91] In re Headen's Estate (1877), 52 Cal. 294; Levine v. Rovegno, supra, n. 87; Tipton v. Martin (1886), 71 Cal. 325, 12 Pac. 244. In Herrold v. Reen, supra, n. 88, the court held that where husband and wife declared a homestead on community property August 1, 1860, and the husband died April 3, 1865, the application to such homestead of the law as amended in 1862 did not interfere with the rights of the wife. The court, however, put this conclusion on the following ground: "It (the act of 1862) enlarges her right without destroying it. It enlarges her right by giving her the estate absolutely, ... and it enlarged her right to dispose of it."

[92] Gagliardo v. Dumont (1880), 54 Cal. 496, 5 Pac. Coast L. J. 305, where husband declared homestead on his separate property May 30, 1867, and his wife died Nov. 14, 1873; Gruwell v. Seybolt, supra, n. 90, where wife declared homestead on husband's separate property in 1871, and he died July 17, 1881.

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declaration of homestead, that her interest acquired thereby was not a mere expectancy, that the code provisions did not amount to a statute of descent, that her interest was not affected by the code amendments of 1874, that it was error for the probate court (in conformity with the amendments of 1874) to assign the homestead to her for life only, and that that court (in conformity with the codes as enacted 1872) should have recognized her ownership of the fee.[93] In the latter case this decision was directly overruled on the ground that it failed to give any effect to the phrase of section 1265 of the Civil Code as enacted 1872 that upon the death of one spouse the homestead "descends to and at once rests in the survivor," such words in the view of the court clearly indicating that the survivor takes by descent and not by virtue of the original declaration of homestead. It was accordingly held that by her declaration of homestead the wife did not secure a vested right beyond the power of subsequent legislative control.[94]

The propriety of the action of a district court of appeal in overruling a decision of the Supreme Court under which a rule of property had been established for 32 years may be doubted; but apart from that matter, in the light of the distinctions pointed out by these cases, it is apparent that the decisions holding the homestead law of 1860 a statute of descent are correct, while those so holding with reference to the law as amended in 1862 are wrong, since the law as then amended says distinctly that husband and wife hold the homestead "as joint tenants" and that upon the death of either it "vests absolutely in the survivor," and contains not a word relating to the descent of the homestead, or setting it apart to the survivor by the probate court.

Fish and game.—It is declared by the late Chief Justice Beatty in one case: "The people of the state being the owner of its wild game, it may be conceded that the state legislature could annex any condition it chose to the privilege of taking it.[95] In the later case it was stated that "The legislature had the right to permit persons to kill or take game upon such terms and conditions as its wisdom might dictate, and . . . . the person killing game might have such property interest in it, and such only, as the legislature might confer."[96] Thus that portion of section 626k of the Penal

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[93] In re Headen's Estate, supra, n. 91.
[94] Hannon v. Southern Pacific R. R. Co., supra, n. 24.
[95] Ex parte Knapp (1899), 127 Cal. 101, 59 Pac. 315.
[96] Ex parte Kenneke (1902), 136 Cal. 527, 69 Pac. 261, 89 Am. St. Rep. 177.

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Code[97] which provides: "Every person who buys, sells, offers or exposes for sale, barter, or trade, any quail . . . . is guilty of a misdemeanor," does not violate any right of property.[98] Similarly, the claim that fish caught lawfully prior to the closed season become articles of merchandise and the property of the person taking them, and that the legislature does not have power to prohibit the sale of such merchandise, and cannot restrict the right to possess the same, cannot be sustained.[99]

Waters.—The legislature had no power by the enactment of the codes to take away from landowners water rights acquired by them prior to the codes.[1] A stream not being a public way if non-navigable, the mere legislative declaration that a certain non-navigable stream is navigable, cannot make it a public way.[2] The taking of a strip of land for highway purposes, does not authorize the public authorities to intercept and divert, without compensation to lower riparian owners, the waters of a small stream that formerly trickled across and through such strip of land.[3] The water rights of the city of Los Angeles in certain streams, as against riparian owners, are those only that were possessed by the pueblo of Los Angeles before the American occupation, and can not be increased by legislative grant.[4] The amendment to section 1410 of the Civil Code,[5] declaring all water and the use of water public property, can not affect or impair water rights which had passed into private ownership before its enactment.[6]

(TO BE CONTINUED)

Charles M. Bufford,

San Francisco, California.

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[97] Enacted by Cal. Stats. 1901, p. 820.
[98] Ex parte Kenneke, supra, n. 96.
[99] People v. Haagen (1903), 139 Cal. 115, 72 Pac. 836.
[1] Lux v. Haggin (1886), 69 Cal. 255, 375, 10 Pac. 674.
[2] People v. Elk River Mill & Lumber Co. (1895), 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125.
[3] People v. Elk River Mill & Lumber Co., supra, n. 2.
[4] Los Angeles v. Pomeroy (1899), 124 Cal. 597, 57 Pac. 585.
[5] Cal. Stats. 1911, p. 821.
[6] Palmer v. Railroad Commission (1914), 167 Cal. 163, 138 Pac 997.

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CORRESPONDENCE

New York, October 5th, 1916.

Editor of California Law Review,

Sir:—

I read with interest the paper of Mr. Robert L. McWilliams entitled "Limitations of the Theory of Corporate Entity in California," published in your issue for September 1916. In the main, I am in accord with the views expressed in the article, and in particular with the proposition that the doctrine of corporate entity should not be pushed too far. In a paper in the Yale Law Journal a few years ago, I said, in substance, that the courts should not permit the doctrine of corporate entity to be used as a whitewash for corporate wrongdoing. (24 Yale Law Journal 177).

Mr. McWilliams states that the doctrine of disregard of the corporate fiction is often involved in cases of fraud. He goes

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on to say: "Frequently cases of fraudulent conveyances made by a vendor to a corporation organized by him are cited as illustrative of this phase of the doctrine." In the foot-note to this sentence he refers to my paper, "Piercing the Veil of Corporate Entity." (12 Columbia Law Review, 496). Mr. McWilliams then says that resort to the doctrine is not necessary in these cases, since the transfer is void as to creditors in any event, and he concludes: "There is no necessity for looking through the corporate veil in such a case."

Now I never suggested, at least I never meant to suggest, that there was any fundamental necessity for penetrating the corporate cloak in these cases. The thought which I meant to convey in that part of my paper was that the courts shake aside the doctrine of corporate entity in these cases, and whether rightly or wrongly, rest their decisions on the express point that courts will ignore the conception of legal corporate entity when it is sought to be used as a shield for fraudulent or illegal acts. It may well be, as Mr. McWilliams says, that there is no real necessity for looking through the corporate veil in this particular class of cases. The fact remains, however, that courts do look through the corporate veil and that they rest their decisions upon the precise proposition suggested in my paper, namely: "When the conception of corporate entity is employed to defraud creditors, to evade an existing obligation, to circumvent a statute, to achieve or perpetuate monopoly, or to protect knavery or crime, the courts will draw aside the web of entity, will regard the corporate company as an association of live, up-and-doing men and women shareholders, and will do justice between real persons." (12 Columbia Law Review 517).

In case after case cited in the article the *ratio decidendi* is the disregard of the corporate fiction. Whether one agrees with the courts in their reasoning or not, this fact must be recognized. (See cases cited in 12 Columbia Law Review, pp. 498-503; also my third edition of Clark on Corporations, pp. 10-12).

In fine, the point is this,—that in citing the cases in my paper as illustrative of the doctrine of disregard of the corporate fiction, I was merely presenting the actual view-point of the courts. And that the courts take the precise point of view outlined in the paper cannot be doubted by any reader of their decisions.

Mr. McWilliams also refers in his paper to the interesting decision of the Supreme Court of California in Higgins v. Cali-

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fornia Petroleum Co., 147 Cal. 363, 81 Pac. 1070. I deemed this case so important as well as interesting that it was reprinted in Canfield & Wormser's Cases on Private Corporations, pp. 28-33. It is quite true as indicated by Mr. McWilliams that the lower court made no finding of any actual fraud in the transaction. It is difficult for me to reconcile this finding with the ultimate decision in the case disregarding the corporate entities. The Supreme Court indicated that the dummy corporations were formed mainly, perhaps solely, to evade an existing legal obligation, namely, a lease involving the payment of certain royalties. Such a corporate genesis certainly seems steeped in fraud. The Supreme Court rightly decided that under such circumstances it would be monstrous to permit the concept of the legal entity to stand as a stumbling block in the path of justice.

The recent cases, in my judgment, not only in the Supreme Court of California but in the courts of last resort of every progressive jurisdiction, establish the following proposition of law,—that a corporation will be regarded as a legal entity distinct and separate from its stockholders only so long as the doctrine is not used to defeat public convenience, justify wrong, or defend crime, in which case it will be regarded as a mere association of individuals. The recent decision of the Supreme Court of the United States in Linn & Lane Timber Co. v. United States, 236 U. S. 574, 35 Sup. Ct. 440, 59 L. Ed. 725, cannot be rationally explained upon any theory other than that of disregard of the corporate entity. Coming from such a high source, it is surely entitled to be regarded with respect. I have been much amused at the frenzied attempts of certain over-conservative Law Journals and Law Reviews hereabouts to explain away the significance of this decision, which unfortunately has not received the degree of attention from the bench and bar which it deserves.

The day is rapidly passing in our law when injustice may be achieved under the cloak of technicality. The doctrine of corporate entity like every other legal doctrine may not be used to obtain an unrighteous advantage. And it follows that rational and progressive courts are fearlessly piercing the veil of corporate entity day after day where this is required in order to achieve justice, which, after all, is the ultimate aim of law.

Yours very truly,

I. Maurice Wormser,
Of the New York Bar; Professor of the Law of Corporations, Fordham University Law School.

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Comment on Recent Cases

ACCOUNT STATED: NATURE OF THE ACTION: NECESSITY OF WRITING.—The opinion in *Fee v. McPhee Company*[1] quotes with approval the following definition of an account stated, given in two earlier California cases:[2] "An account stated is a document—a writing—which exhibits the state of account between parties and the balance owing from one to the other; and when assented to, either expressly or impliedly, it becomes a new contract." The court also cited other authority[3] containing definitions which do not include writing. The mention of writing being dictum in the case, the question arises, whether it is essential.

In the first place, what is the exact nature of an account stated? In its simplest form, it arises as follows. Two people have had one or more business transactions with each other. They come to an agreement upon the amount of the final balance which is due from one to the other. This agreement is an account stated. It is often said to be a new and independent contract, having for its consideration the original items of the account.[4] It is also said to be not a contract at all, but simply prima facie proof of the balance due.[5] The latter is believed to be the better view, though an account stated has some of the features of a contract.

In support of the view that it is a contract, is the fact that the statute of limitations begins to operate upon it from the date the balance is struck, as upon a new cause of action.[6] That is a statutory development, of course. Again, the California rule is that the items of the original account are merged and the right to action upon them lost.[7] There is authority in other states to the contrary, however, which seems to be based on better reason.[8] The California rule probably arises from a confusion of accounts stated with compromise. A compromise is a bar to the action on the original items, because it is a new contract, based on new consideration. An account stated, properly so called, has no new consideration. It is prima face evidence of the correctness of an account, while a compromise is a conclusive agreement to accept a certain balance without an accounting.[9] A true account stated

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[1] (Aug. 28, 1916), 23 Cal. App. Dec. 287.

[2] Coffee v. Williams (1894), 103 Cal. 550, 37 Pac. 504; Gardner v. Watson (1915), 170 Cal. 570, 150 Pac. 994.

[3] 1 R. C. L. 207.

[4] Auzerais v. Naglee (1887), 74 Cal. 60, 15 Pac. 371; Kearney v. Bell (1911), 160 Cal. 661, 117 Pac. 925.

[5] Nutt v. U. S. (1888), 23 Ct. Cl. 68 affirmed in (1888), 125 U. S. 650, 31 L. Ed. 821, 8 Sup. Ct. Rep. 997; McKinster v. Hitchcock (1886), 19 Neb. 100, 26 N. W. 705; 1 C. J. 707; 3 Harvard Law Review, 261; dissenting opinions in Auzerais v. Naglee, supra, n. 4.

[6] Auzerais v. Naglee, supra, n. 4.

[7] National Lumber Co. v. Tejunga Valley Rock Co. (1913), 22 Cal. App. 726, 136 Pac. 508.

[8] 2 California Law Review, 50.

[9] 3 Harvard Law Review, 261.

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is not conclusive, and the balance found may be altered by proof of errors in the accounting, as was done in the case under discussion.[10] Particular items may of course be compromised prior to the accounting.

If it is concluded that an action upon an account stated is in reality upon the balance of the original account, it follows that any statutory provisions which would have prevented recovery upon particular items will also bar recovery upon the balance to the extent of those items. The law is to that effect. Considered as a contract, an account stated is not within the statute of frauds,[11] yet it is generally held that the action will not lie if the items of account are within the bar of the statute.[12] When the items are barred by limitation, and a written acknowledgment signed by the debtor is required to remove the bar, mere agreement upon a balance, without such writing, will not afford a basis of action.[13]

Even where writing is not required for the above reasons, it is usually present, as the most common basis of the action is a written statement sent by the creditor and assented to by the debtor through failure to dispute it.[14] Probably for these reasons, the words "document" and "writing" were inadvertently incorporated into the definition quoted above. In none of the cases adopting that definition was the necessity of writing involved. On the other hand, it is well settled that the agreement is not a "contract in writing,"[15] nor necessarily evidenced by a writing.[16] It may be wholly oral, even though based on items which must themselves be in writing.[17] Unless the definition is revised by eliminating the mention of writing, its further repetition may mislead some defendant sued upon an oral account stated into relying upon the dictum as a defense to the action.

It is also to be noticed that the term "account stated" has come to mean the agreement itself, not the statement upon which such agreement was based. The latter sense, in which it is used in this definition, is no doubt the natural one to be derived from the ordinary use of the words, but to avoid ambiguity, it might be better to refer to the statement as the "account rendered," which, together with the assent to it, forms the account stated.[18]

O. C. P.

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[10] Supra, n. 1.

[11] Converse v. Scott (1902), 137 Cal. 239, 70 Pac. 13.

[12] 27 L. R. A. 811, 819, note.

[13] Visher v. Wilbur (1907), 5 Cal. App. 562, 90 Pac. 1065.

[14] Sherman v. Sherman (1692), 2 Vern. 275, 23 Eng. Rep. Repr. 778, is the earliest reported case on account stated.

[15] National Cycle Mfg. Co. v. San Diego Cycle Co. (1902), 135 Cal. 335, 67 Pac. 280.

[16] Converse v. Scott, supra, n. 11; Baird v. Crank (1893), 98 Cal. 293, 33 Pac. 63; Kahn v. Edwards (1888), 75 Cal. 192, 16 Pac. 779, 7 Am. St. Rep. 141; 1 C. J. 682, and cases cited.

[17] 27 L. R. A. 811, 815, note.

[18] Mercantile Trust Co. v. Doe (1914), 26 Cal. App. 246, 256, 146 Pac. 692; 3 California Law Review, 317.

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ADMIRALTY: HAVE STATE COURTS JURISDICTION TO DECLARE A SALE OF A VESSEL AT THE INSTANCE OF A MINORITY OWNER?—In *Fischer v. Carey*[1] the California court was called upon for the first time to decide this question. The minority owners becoming dissatisfied with the employment of the vessel by the majority owners, brought a suit in equity asking that a receiver be appointed, a sale of the vessel be decreed and the proceeds distributed proportionately. The Civil Code[2] declares that disputes between part owners of a vessel may be settled by a court of competent jurisdiction; but it was held, in the able opinion of Mr. Justice Henshaw in which the authorities are thoroughly reviewed, that a state court was not such a court, the federal courts having exclusive jurisdiction over such matters.

The Federal Judiciary Act[3] declares that the federal courts shall have exclusive jurisdiction of all cases of admiralty and maritime jurisdiction, saving in all cases a right to a common law remedy where the common law is competent to give it. Thus under this saving clause the state courts have concurrent jurisdiction in certain matters. In all partition cases there are two points to be determined: Are such suits cognizable in admiralty, and is there concurrent jurisdiction in the state courts? Admiralty has always entertained jurisdiction of partition matters;[4] and as to the second point, all actions in admiralty permissible in the state courts must proceed in personam,[5] and hence it is only in such actions that the state courts have concurrent jurisdiction. An action for a sale of a vessel is in rem, being against the thing itself, and, therefore, not within the concurrent jurisdiction of the state courts.[6]

The argument for state jurisdiction is based on the fact that while the federal courts have always afforded relief where suit was brought by equal part owners,[7] they have uniformly refused it at the instance of minority owners,[8] the conclusion being drawn that

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[1] (July 27, 1916), 52 Cal. Dec. 194, 159 Pac. 577.

[2] Cal. Civ. Code, § 964.

[3] U. S. Rev. Stats., § 563, subdv. 8.

[4] The Seneca (1829), Fed. Cas. 12,670; Ex parte Easton (1877), 95 U. S. 68, 24 L. Ed. 373; Benedict, Admiralty, § 187.

[5] The Moses Taylor v. Hammons (1866), 71 U. S. 411, 18 L. Ed. 397; Griswold v. The Otter (1867), 12 Minn. 465; Knapp, Stout & Co. v. McCaffrey (1900), 177 U. S. 638, 646, 648, 44 L. Ed. 921, 20 Sup. Ct. Rep. 824; Benedict, Admiralty, § 187.

[6] Steamboat Co. v. Chase (1872), 83 U. S. 522, 533, 21 L. Ed. 369; Aurora Shipping Co. v. Boyce (1911), 191 Fed. 960. A state cannot authorize a proceeding in rem for causes of action cognizable in admiralty. De Lovio v. Boit (1815), Fed. Cas. 3,776; Crawford v. Bark "Caroline Reed" (1871), 42 Cal. 469; 32 Am. Dec. 68, note.

[7] The Seneca, supra, n. 4; Burr v. The St. Thomas (1851), Fed. Cas. 2,194a; The Annie H. Smith (1878), Fed. Cas. 420; Coyne v. Caples (1881), 8 Fed. 638.

[8] Orleans v. Phoebus (1837), 36 U. S. 175, 9 L. Ed. 677; Tunno v. The

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relief is refused from lack of jurisdiction. This view has small support.[9]

The more logical view is that expressed in the principal case.[10] It is not that the federal courts have no jurisdiction over partition suits brought by minority owners, or they would have dismissed them on that specific ground without deciding on the merits of the cases, but rather that to grant relief in such cases would be directly contrary to the well recognized principle in admiralty of right of control in the majority.[11] Moreover, the action is necessarily in rem, being against the ship itself, and over such actions in admiralty the federal courts have exclusive jurisdiction. In the light of these principles the decision of the California court seems unimpeachable.

J. M. P.

BOUNDARIES: PRESUMPTION THAT GRANTEE TAKES TO CENTER.—The presumption is well established that a purchaser of land bordering on a highway takes title to the center thereof unless a contrary intention appears from conveyance.[1] Such by statute is declared to be the law of California.[2] The contrary intention may be expressly declared—though there is authority which holds that not even this is controlling,[3]—or it may be gathered from the terms of the grant. The question then in all such cases is just what words of description will be held sufficient to rebut this presumption.

There would seem to be two clear lines of authority on this subject. (1) The use of the words "on" "by" or "along"[4] a highway will convey title to the center of the highway, while on the other hand a description of land as bounded by the "edge" "side" or "margin"[5] or "to the line"[6] of the highway is held to exclude the center of the way. (2) The second class of cases

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Betsina (1857), Fed. Cas. 14,236; The Ocean Belle (1872), Fed. Cas. 10,402; Hughes, Admiralty, 296.

[9] Andrews v. Betts (1876), 8 Hun. (N. Y.) 322; Swain v. Knapp (1884), 32 Minn. 429, 21 N. W. 414; Reynolds v. Nielson (1903), 116 Wisc. 483, 93 N. W. 455, 96 Am. St. Rep. 1000.

[10] Supra, n. 1.

[11] 1 R. C. L. 416; Hughes, Admiralty, 296; Supra, n. 1.

[1] 2 Tiffany, Real Property, § 392; 2 Reeves, Real Property, § 1131, p. 1506; 5 Cyc. 905.

[2] Cal. Civ. Code, §§ 831, 1112.

[3] Peck v. Smith (1820), 1 Conn. 103, 6 Am. Dec. 216.

[4] 2 Tiffany, Real Property, p. 894; White v. Godfrey (1867), 97 Mass. 472; 2 Reeves, Real Property, p. 1508, and authorities there cited.

[5] Smith v. Slocomb (1858), 77 Mass. 280; Van Winkle v. Van Winkle (1906), 184 N. Y. 193, 77 N. E. 33; McKenzie v. Gleason (1904), 184 Mass. 452, 69 N. E. 1076; 2 Reeves, Real Property, p. 1506; Walker v. Boynton (1876), 120 Mass. 349.

[6] Hamlin v. Pairpoint M'f'g. Co. (1886), 141 Mass. 51, 6 N. E. 531; Iron Mt. Ry. Co. v. Bingham (1889), 87 Tenn. 522, 11 S. W. 705; Buck v. Squiers (1850), 22 Vt. 484; Severy v. Central Pac. R. Co. (1875), 51 Cal. 194; Macadamizing Co. v. Williams (1886), 70 Cal. 534, 12 Pac. 530.

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holds that not even when the side[7] of the street is designated or the boundary is described as being to the line, is the presumption rebutted, these descriptions being held entirely too insignificant to produce a result so inconvenient and so contrary to the practice of the people. As well expressed in an early Pennsylvania case,[8] "The paramount intention of the parties as disclosed from the whole scope of the conveyance and the nature of the property granted should be the controlling rule." Between these opposing views the weight of authority is about equally divided.

In *Berton v. All Persons,*[9] following two earlier decisions in California,[10] it was decided that the description "to the northerly line of Frank Place and easterly along said line," meant that the grantee took only the edge of the street, and this without looking further for the intention of the parties. Thus California is in line with the first class of cases above, though the better reasoning would seem to be with the latter.

It should take very clear circumstances to rebut a presumption which is so strong that even when there is no mention of the highway the grantee takes to the center thereof,[11] and which is based on a sound public policy opposed to needless litigation. The decision of a court in such cases should not be made to depend upon a mere technical distinction in the use of prepositions, but the intention of the parties should be construed in the light of all the circumstances, and effect given to the presumption in every case possible, and this for obvious reasons. Suppose a street were vacated years after it was opened. The rule that the adjacent owners held title only to the edge of the way would necessitate tracing up the heirs of the original grantor, involving much expense and waste of time. Besides, of what value to anyone, except the adjacent landowners is a narrow strip of land with possibly no outlet? The California decisions seem to have overlooked the true public policy underlying the subject and to have confined attention entirely to the literal and grammatical construction of language.

J. M. P.

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[7] Furthermore in these cases the actual measurement of the lines according to the deed would only carry them to the edge of the road. Johnson v. Anderson (1842), 18 Me. 76; Cox v. Freedley (1859), 33 Pa. St. 124, 75 Am. Dec. 584; 13 Harvard Law Review, 150; Paul v. Carver (1856), 26 Penn. 223, 67 Am. Dec. 413 and note; Gould v. Eastern R. Co. (1886), 142 Mass. 85, 7 N. E. 543.

[8] Paul v. Carver, supra, n. 7; Moody v. Palmer (1875), 50 Cal. 31; 4 R. C. L. 78.

[9] (Aug. 7, 1916), 52 Cal. Dec. 186.

[10] Severy v. C. P. R. R. Co., supra, n. 6; Macadamizing Co. v. Williams, supra, n. 6.

[11] Merchant v. Grant (1915), 26 Cal. App. 485, 147 Pac. 484; Champlin v. Pendleton (1838), 13 Conn. 23; Tiffany, Real Property, Vol. II, p. 893.

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CRIMINAL LAW: DISTINCTION BETWEEN LARCENY AND EMBEZZLEMENT.—Is the felonious taking of money from a cash register by a clerk larceny or embezzlement? This question has not as yet been passed upon by the court of last resort in this state, but the District Court of Appeal, in *People v. Howard*,[1] reversing the judgment of the lower court, held the taking to be embezzlement and not larceny. The taking in that case was by a clerk employed in a business college, whose duty was to sell stationery and other small articles of merchandise, depositing the money received in a cash register provided for that purpose. As the amount stolen was three hundred dollars, a large amount considering the nature of the business, the only reasonable inference is that the money was taken from the cash register and not that it was misappropriated by the clerk directly upon its receipt from a customer.

The fundamental distinction between larceny and embezzlement turns upon the question of possession. In larceny there is a trespass, and the crime involves the idea of an unlawful acquisition of property, while in embezzlement there is a fraudulent conversion of property after its possession has been lawfully acquired.[2] Larceny, in other words, is the wrongful taking of property from the possession of the owner, while embezzlement is the wrongful appropriation of another's property by a person to whom it has been intrusted or into whose hands possession has lawfully come.[3] Applying this definition to the principal case, the query then is—in whom was the possession of the money in the cash register vested? If the clerk had possession the crime was embezzlement, if on the other hand the master had possession, the clerk merely having custody, the crime was larceny.

It may frequently be a question of great nicety to determine whether a clerk has possession or whether he has merely the custody of the thing. This difficulty in pointing out where the borderland of custody ceases and that of possession begins was not so great formerly as it is to-day. At early common law the dividing line between custody and possession was perhaps more clearly maintained by certain rather definite and objective tests. It was apparently the general theory of our early law that when the master delivered to his servant a chattel to be carried elsewhere, the servant had possession,—at least when the chattel had been carried outside the house or clearly beyond the personal presence,

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[1] (Sept. 9, 1916), 23 Cal. App. Dec. 335.

[2] People v. Gallagher (1893), 100 Cal. 466, 35 Pac. 80; People v. Montarial (1898), 120 Cal. 691, 53 Pac. 355; People v. Perini (1892), 94 Cal. 573, 29 Pac. 1027; People v. Johnson (1891), 91 Cal. 255, 27 Pac. 663; People v. Belden (1869), 37 Cal. 51; Cal. Pen. Code, §§ 484, 503, 508, 509.

[3] Warmoth v. Commonwealth (1883), 81 Ky. 133, 4 Ky. Law Report 937; 9 R. C. L. 1266; 6 Harvard Law Review 244; 2 Bishop, New Criminal Law (8th ed.), § 811; 1 Bouvier Law Dict. (1897 ed.), 655; 2 Bouvier Law Dict. (1897 ed.), 134.

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sight or control of the master (the theory was not clear); whereas if a third person delivered a chattel to the servant for the master the former had possession temporarily. It is doubtful whether, in the time of the Year Books, the servant would or would not have had possession when the delivery was made *in* the master's shop or the servant had brought the chattel to the shop. But at any rate it early came to be the view of our law that the servant did have possession under such circumstances, and consequently, a "doctrine of ultimate destination" was developed to determine when the possession of the servant as bailee was transformed into a mere custody, the possession being transferred to the master.[4]

The somewhat illogical distinctions of the old law have been abandoned.[5] Each case, or class of cases, must now, to a large extent, be decided by reverting to first principles. Certain valuable tests applicable to particular groups or classes of cases are however available and among them remains the "doctrine of ultimate destination" which has been applied to the situation presented in the principal case by eminent text writers and by a number of adjudicated cases.[6] The doctrine is that while a thing to which one has become entitled, not having been his originally, is on its transit to him through servants, it cannot be the subject of larceny by a servant, until by some unequivocal act it either comes within the personal control of the master or otherwise reaches its ultimate destination.[7] Now what is an "ultimate destination" within this rule as applied to the principal case? Ordinarily if a clerk puts coins or bank-notes received from a customer directly and in the first instance into his own pocket, or if he conceals them elsewhere in order to appropriate them on a subsequent occasion, he does not commit larceny but embezzlement.[8] Neither the person of the servant nor the hiding place is an "ultimate destination" or place of ultimate deposit. And as the clerk does not commit trespass in either of these cases he is not guilty of larceny. Where on the other hand, a clerk places coins received from a customer directly into the cash register, and afterward with felonious intent opens

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[4] Commonwealth v. Ryan (1892), 155 Mass. 523, 30 N. E. 364; Pollock & Wright, Possession in the Common Law, pp. 59, 60, 122, 138, 162, 194, 195; 6 Harvard Law Review, 244; Holmes on The Common Law, 226-28; Holmes, J., in Commonwealth v. Ryan, citing Y. B. 2 Edw. IV, 15 pl. 7; Fitzh. Nat. Brev. 91 E.

[5] Supra, n. 4.

[6] Warmoth v. Commonwealth, supra, n. 3; Snapp v. Commonwealth (1884), 82 Ky. 173, 6 Ky. Law Rep. 34; Commonwealth v. Ryan, supra, n. 4; 1 Wharton, Criminal Law (10th ed.), § 962; 2 Bishop, New Criminal Law (8th ed.), § 829.

[7] Supra, n. 8; Robinson's Case (1755), 2 East Crown Law (1806 ed.), 565; Rex v. Murray (1784), 2 East Crown Law 683, 1 Leach 344; Rex v. Chipchase (1795), 2 East Crown Law, 567, 2 Leach 805; Regina v. Hayward (1844), 1 Car. and K. 518, 47 Eng. C. L. 516; People v. Bidleman (1894), 104 Cal. 608, 38 Pac. 502; Pollock & Wright, supra, n. 4.

[8] Supra n. 8 and 9; Bazeley's Case (1799), 2 East Crown Law, 571, 2 Leach 835; Warmouth v. Commonwealth, supra, n. 8.

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the register and takes them out, the cases unanimously hold that he commits larceny.[9] The situation presented in the case of Commonwealth v. Ryan[10] brings out in an exceptionally clear manner the distinction between place of concealment and place of ultimate deposit, and at the same time emphasizes the necessity of an unequivocal act transfering possession to the master, thereby terminating the servant's power and control over the thing. In that case the clerk feloniously withdrew from the money drawer of a cash register money which he had placed there a moment before without registering the sale of the article by closing the cash drawer. The open drawer was, in short, a sort of temporary place of concealment. And as the clerk had not in that case, as he probably had in the principal case, performed the unequivocal act of closing the cash drawer the coins had not arrived at their ultimate destination. The taking in the Ryan case was therefore held to be embezzlement, and it would seem equally clear that the taking in the principal case should have been held to be larceny, unless section 508 of the Penal Code can be interpreted as changing the general rule, by making every misappropriation by a servant embezzlement, which hardly seems the proper construction to place upon that section.[11]

H. A. J.

DAMAGES: LIQUIDATED DAMAGES OR PENALTY.—The effect of a provision in a contract for stipulated damages being held a "penalty" is to limit recovery to actual damages.[1] This technical connotation attached to the word penalty, was a result of equity's relief against a penalty bond, where the sum stipulated was construed as mere security for the actual damage.[2] Equity proceeded upon the principle that the parties cannot, by express stipulation, agree upon more than a just compensation.[3]

Whether the parties intended the sum as a bona fide pre-estimate of damages—that is, liquidated damages—or merely a security for a possible breach, is a question primarily of intent to be gathered from all the circumstances of the case.[4] But the express intent of the parties is not conclusive, and the words "penalty" or

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[9] Supra, n. 8, 9, and 10; Bazeley's Case, supra, n. 10; Rex v. Hammon (1812), 4 Taunt. 304, 2 Leach 1083, 128 Eng. Rep. Repr. 346; Walker v. Commonwealth (1837), 8 Leigh (Va.) 743.

[10] Supra, n. 4.

[11] Supra, n. 2.

[1] Dunlop Tyre Co. v. New Garage etc. Co. (1914), L. R. (1915), A. C. 79; Muldoon v. Lynch (1885), 66 Cal. 536, 6 Pac. 417.

[2] Benson v. Gibson (1746), 3 Atk. 395, 26 Eng. Rep. Repr. 1027; Sloman v. Walter (1783), 1 Brown Ch. 418, 28 Eng. Rep. Repr. 1213.

[3] Myer v. Hart (1879), 40 Mich. 517, 523; 1 Sedgwick, Damages (9th ed.), § 407.

[4] Streeter v. Rush (1864), 25 Cal. 68, 71; Nakagawa v. Okamota (1913), 164 Cal. 718, 130 Pac. 707; Sloman v. Walter, supra, n. 2; Sedgwick, Damages (9th ed.), § 406.

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"liquidated damages" afford only prima facie evidence of intent.[5] It is obvious that if the stipulated sum is largely disproportionate to any reasonable idea of actual damage, it will be held to be a penalty.[6] But if the sum appears reasonable, the court applies a number of other tests.[7] At common law, the fact that damages were difficult of ascertainment was good evidence that the parties intended liquidated damages and not a penalty.[8] The California Civil Code requires that liquidated damages may be fixed if it "be impracticable or extremely difficult to fix the actual damage," and the courts have strictly construed this provision.[9] If the stipulated sum is made payable upon the breach of any of a number of conditions of varying importance, the weight of authority is that the sum will be held a penalty.[10] But the modern English rule is to consider such a situation mere prima facie evidence of intent to provide a penalty.[11] In case of doubt the courts are inclined to hold the sum a penalty.[12]

While probably actual damage is always considered by the court in construing the intent of the parties, it is unsettled whether actual damage needs to be proved.[13] While apparently this is not required by the weight of authority, yet it would seem to be more consonant with principle to require such proof, for since the principle of granting damages is to award just compensation,[14] the court should be permitted to examine the particular circumstances accompanying the actual breach.[15]

This question was directly considered in California for the first time in *Vath v. Hallett*,[16] where liquidated damages were expressly

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[5] Dunlop Tyre Co. v. New Garage Co., supra, n. 1; Poque v. Kaweah Co. (1903), 138 Cal. 664, 72 Pac. 144.

[6] Muldoon v. Lynch, supra, n. 1; Myer v. Hart, supra, n. 3; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[7] Dunlop Tyre Co. v. New Garage Co., Supra, n. 1; 1 Sedgwick Damages, (9th ed.), § 406.

[8] Cal. Steam Nav. Co. v. Wright (1856), 6 Cal. 258, 65 Am. Dec. 511; Clark v. Barnard (1882), 108 U. S. 436, 27 L. Ed. 780, 2 Sup. Ct. Rep. 878.

[9] Cal. Civ. Code, §§ 1670, 1671; Pac. Factor Co. v. Adler (1891), 90 Cal. 110, 27 Pac. 36; Potter v. Ahrens (1896), 110 Cal. 674, 43 Pac. 388; Long Beach etc. v. Dodge (1902), 135 Cal. 401, 67 Pac. 499.

[10] Chicago Wrecking Co. v. United States (1901), 45 C. C. A. 343, 106 Fed. 385; Camor v. Watts (1885), 115 U. S. 353, 29 L. Ed. 406, 6 Sup. Ct. Rep. 91; Wallis v. Smith (1882), L. R. 21 Ch. Div. 243.

[11] Pye v. British Auto Syndicate (1906), L. R. (1906), 1 K. B. 425; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[12] People v. C. P. R. R. (1888), 76 Cal. 29, 18 Pac. 90; Davies v. Penton (1827), 6 B. & C. 216, 108 Eng. Rep. Repr. 433.

[13] Clement v. Railroad Co. (1890), 132 Pa. 445, 19 Atl. 274, 276; Kelso v. Reid (1892), 145 Pa. 606, 23 Atl. 323, 27 Am. St. Rep. 716; McCann v. City of Albany (1899), 158 N. Y. 634, 53 N. E. 673; Hathaway v. Lynn (1889), 75 Wisc. 186, 43 N. W. 956, 6 L. R. A. 551; Clydebank Engineering Co. v. Don Jose Ramos etc. (1904), L. R. (1905) A. C. 6.

[14] Myer v. Hart, supra, n. 3; Muldoon v. Lynch, supra, n. 1.

[15] Hahn v. Horstman (1876), 75 Ky. 249; Colwell v. Foulks (1868), 36 How. Pr. (N. Y.) 306.

[16] (Aug. 25, 1916), 23 Cal. App. Dec. 283.

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stipulated for in case of the breach of an agreement to buy from the plaintiff all liquor and supplies for a period of six years. On demurrer two reasons were stated for denying liquidated damages: first, that the same sum was fixed in the event of the breach of any of a number of stipulations of varying importance. This seems to follow the weight of authority as well as an earlier California case.[17] The second point was that no substantial damage had been shown, although no prior California decision has even suggested this as a prerequisite to the recovery of liquidated damages.[18] The view of the court, however, seems to mark an advance toward the true principle of damages; that is, to award just compensation.

J. B. W.

ELECTIONS: CANDIDATE'S RIGHT TO WITHDRAW.—In *Bordwell v. Williams*[1] it was decided that a candidate may withdraw and have his name left off the primary ballot after he has been regularly certified to the various county clerks and registrars as a candidate for the Republican nomination for United States senator.

There is some reason in the proposition that the party public have a certain interest in prohibiting a candidate from deserting the field after the expiration of the time allowed for qualifying as a candidate entitled to have his name placed on the primary ballot. But the principal case appears sound. A citizen is not required to seek election to office and in the absence of a contrary statutory provision the mere fact that he has announced his candidacy should not preclude him from withdrawing whenever he desires to do so. The legislature has provided that before any elector may have his name put on the primary ballot, he must sign an affidavit stating that if nominated he will accept such nomination and not withdraw.[2] This would seem to indicate that a withdrawal before nomination at the primary election was contemplated by the legislature.[3]

The question of a candidate's right of withdrawal after nomination at the primary election presents greater difficulty. Although there is no adjudicated case in point in California, there are two cases under statutes similar to our own which came to opposite conclusions. One theory is that the affidavit not to withdraw after nomination at the primary election is only to insure good faith and that a person would hardly be required to swear not to do a thing which he could not do.[4] The other theory is that the legislature

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[17] People v. C. P. R. R., supra, n. 12; Dunlop Tyre Co. v. New Garage Co., supra, n. 1.

[18] There are conflicting dicta on the question. See Muldoon v. Lynch, supra, n. 1; Eva v. McMahon (1888), 77 Cal. 467, 472, 19 Pac. 872; Potter v. Ahrens, supra, n. 9; Nakagawa v. Okomoto, supra, n. 4.

[1] (Aug. 18, 1916), 52 Cal. Dec. 267, 159 Pac. 869.

[2] Cal. Stats. 1913, p. 1389.

[3] State v. Brodigan (1914), 37 Nev. 458, 142 Pac. 520.

[4] Elswick v. Ratliff (1915), 166 Ky. 149, 179 S. W. 11.

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intended that the candidate should not be permitted to withdraw, for if otherwise an oath to the effect that he intended not to withdraw would have been provided instead of the unconditional sworn statement that if nominated he will not withdraw.[5] This latter theory has received an extended application under a provision,—which is not present in our statute,—that an unopposed candidate for the party nomination after the time for regularly qualifying as such has expired, is the party nominee.[6]

The latter theory appears the more reasonable. It is rather strained to say that the legislature would go to the extent of requiring a sworn statement that the candidate will not withdraw if nominated at the primary election for the purpose merely of insuring good faith. The affidavit is required to insure good faith and more; it is required so that a candidate will not be permitted to trifle with the party public by withdrawing after he has voluntarily become a candidate and received a majority of the votes and the state has been put to the expense of a primary election. It would seem that the courts in such a case should not aid a person to do that which he has sworn that he would not do.

F. H. M.

MORTGAGE: TENDER AFTER DEFAULT.—At common law tender of payment by the pledgor after the day was sufficient to discharge the lien on the goods if the tender was refused.[1] In the case of a mortgage after the day neither tender nor payment had any effect, the title by the non-performance at maturity being absolutely vested in the mortgagee.[2]

The common law rule as to pledges still prevails practically everywhere that an unaccepted tender of the amount due discharges the lien,[3] even though made after maturity of the debt and not kept good.[4] While some states retain the common law theory of mortgage, the modern tendency is to consider a mortgage only a lien upon the property, a mere security for the primary obligation, the debt.

Manifestly under the common law view that the mortgagee has legal title, a tender after default would not affect the mortgagee's rights. Under the equitable theory, however, the mortagee, though retaining the legal title, retains it merely as security for the debt owing. Some courts, which cling to that theory, hold that a tender of the payment of the mortgage debt after maturity will not

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[5] State v. Hamilton (1910), 33 Nev. 418, 111 Pac. 1026.
[6] State v. Brodigan, supra, n. 3.

[1] Comyn's Dig. Tit. Mort. B; Coggs v. Barnard (1703), 1 Comyn's 133, 136, 92 Eng. Rep. Repr. 999; Mitchell v. Roberts (1883), 17 Fed. 776.
[2] Currier v. Gale (1865), 9 Allen 522; Rowell v. Mitchell (1876), 68 Me. 21; Maynard v. Hunt (1827), 5 Pick 240.
[3] Loughborough v. McNevin (1887), 74 Cal. 250, 14 Pac. 369, 5 Am. St. Rep. 435.
[4] Mitchell v. Roberts, supra, n. 1.

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operate to extinguish the title of the mortgagee or discharge the lien of the mortgage unless the money tendered is placed in the custody of the court.[5]

A third view is taken in New York and a few other jurisdictions where the old common law mortgage has undergone a complete change; the mortgagee has not the legal title, and the mortgage is nothing more than a security for the debt. In those states, the courts have logically followed the analogy of a pledge and hold that a mere tender, after default, even where the money has not been deposited in court, is sufficient to destroy the lien.[6]

For California to be logically consistent with her own interpretation of a mortgage she would have to adopt the New York rule. The California mortgage appears to be little more than a pledge, the title being in the mortgagor. But California has taken the view that a tender after the day does not destroy the lien.[7] In Perre v. Castro the court said, "The debtor is as much in default for not paying when the debt is due as the creditor is in default for not receiving the money afterwards when offered. It would be very harsh to hold that the debt is lost—the general effect of losing the security—by a mere refusal at a particular moment to receive it." The case is a good illustration of the tendency of the courts to cling to the common law conception of the mortgage when a strict analogy to liens leads to apparently undesirable results.[8]

Another example of this tendency of the courts to avoid the harshness of the New York rule is shown in the Washington case of *Easton v. Littooy*,[9] where the decision was that "in order to discharge the lien, the proof must be clear that the refusal was palpably unreasonable, absolute, arbitrary and unaccompanied by any bona fide, though mistaken, claim of right." There is some authority for this restriction.[10]

F. H. W.

MUNICIPAL CORPORATIONS: SPECIAL ASSESSMENT OF RAILROAD RIGHT OF WAY FOR IMPROVEMENTS.—Can a special assessment of a local improvement validly levied upon land occupied by a railroad right of way be collected, or is this a situation in which there is a right without a remedy? At first sight it might seem that

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[5] Maxwell v. Moore (1892), 95 Ala. 166, 10 So. 444, 36 Am. St. Rep. 190.

[6] Kortright v. Cady (1860), 21 N. Y. 343, 78 Am. Dec. 145; Thomas v. Seattle Brewing Co. (1908), 48 Wash. 560, 94 Pac. 116, 15 L. R. A. (N. S.) 1164, 125 Am. St. Rep. 945, 15 Ann. Cas. 494. See note in 3 California Law Review, 336.

[7] Perre v. Castro (1860), 14 Cal. 519, 76 Am. Dec. 444; Himmelmann v. Fitzpatrick (1875), 50 Cal. 650.

[8] Accord, Knollenburg v. Nixon (1903), 171 Mo. 445, 72 S. W. 41.

[9] (Wash., June 23, 1916), 158 Pac. 531.

[10] Canfield v. Conkling (1879), 41 Mich. 371; Renard v. Clink (1892), 91 Mich. 1, 51 N. W. 692; Union Mutual Life Ins. Co. v. Union Mills Co. (1889), 37 Fed. 286; Cf. Williams v. Ashe (1896), 111 Cal. 180, 185, 43 Pac. 595.

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there would be two ways in which such an assessment might be collected; that is, first, by a personal judgment against the railroad, and, second, by sale of the land occupied by the railroad either subject to, or freed from, the easement of the railroad right of way.

If the assessment could be made a personal liability of the railroad there would be no difficulty in collecting it. But in *Atchison, Topeka & Santa Fe Railway Company v. Reclamation District No. 404*,[1] a case in which a special assessment was levied upon a railroad right of way by a reclamation district, it was held that the special assessment could not be collected by "resort to a personal judgment to enforce payment" thereof. The foundation upon which the court rested this decision seems unshakable. The California code provides that delinquent reclamation district assessments are to be collected by sale of the property assessed,[2] and no other means being authorized, it follows that this is the exclusive method to be pursued in their collection. Furthermore, under the rule of Taylor v. Palmer,[3] any statute which attempts to make the landowner personally liable for a special assessment is unconstitutional.

Is it possible to sell the land occupied by the railroad right of way either subject to the easement of the right of way, or freed from it? While it is legally possible to sell the fee of the land subject to the railroad's right of way,[4] this is not ordinarily practicable, because the railroad is in general entitled to the exclusive possession of the right of way so long as it continues to use it, and consequently the value of the bare fee is highly speculative. On the other hand it was held in Southern California Railway Company v. Workman that a fractional portion of the easement of a railroad used for its right of way cannot be sold under a special assessment unless such sale has been authorized by the legislature in "clear and unambiguous language."[5] This decision proceeds upon the theory that the railroad is dedicated to public service, and that a sale of a portion of its right of way would "greatly disturb the public use and interest." It is interesting to note, however, as to the three cases from which the California court quotes in reaching this decision, that one has been stripped of its authority by subsequent decisions, and that the effect of a second has since been

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[1] (July 22, 1916), 52 Cal. Dec. 111, 159 Pac. 430.

[2] Cal. Pol. Code, § 3466.

[3] (1866), 31 Cal. 241; Beaudry v. Valdez (1867), 32 Cal. 269; Gaffney v. Gough (1868), 36 Cal. 104; Coniff v. Hastings (1868), 36 Cal. 292; Manning v. Den (1891), 90 Cal. 610, 27 Pac. 435; Santa Cruz Rock Pavement Co. v. Bowie (1894), 104 Cal. 286, 37 Pac. 934.

[4] Schaffer v. Smith (1915), 169 Cal. 764, 147 Pac. 976.

[5] Southern California Railway Co. v. Workman (1905), 146 Cal. 80, 82 Pac. 79; Fox v. Workman (1909), 155 Cal. 201, 100 Pac. 246. See also, San Pedro etc. Ry. Co. v. Pillsbury (1914), 23 Cal. App. 675, 139 Pac. 669; Los Angeles Pacific Co. v. Hubbard (1911), 17 Cal. App. 646, 121 Pac. 306.

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nullified by legislative action.[6] These facts suggest that on principle the Workman case might possibly bear reconsideration. The real basis of the doctrine of the last named case is that the public interest is so vitally involved in the sale of a fractional portion of a railroad right of way that it must be presumed that the legislature did not intend general words such as "land," or "property," as used in the authorization of the sale,[7] to include such property as a fractional portion of a railroad right of way. The fact that the public interest is vitally concerned is a prerequisite to the application of this doctrine. But, in reality, would the public interest be vitally affected by the authorization of the sale of a fractional portion of a railroad right of way? Theoretically, it might possibly have been argued prior to 1915 that this question should be answered in the affirmative, but in that year the legislature cut the last prop from under this argument by giving the Railroad Commission power to co-ordinate, in the public interest, the service of the various railroads of the state:[8] practically, this question could never have been answered in the affirmative, for no solvent railroad would ever allow its road to be cut in two to pay a validly levied special assessment. If the situation ever actually came to a point where it was either a question of the railroad's paying the assessment, or having a portion of its right of way sold, the railroad would choose the former course. The anomaly of freeing any one—even one exercising such a high public trust as a railroad—from the duty of bearing his share of the expense of public work ought, if possible, to be avoided.

R. E. H.

PERSONS: THE STATUS OF CONVICTS.—The Corpus Juris of Justinian imposed the loss of the *status libertatis* on one condemned of crime. This meant not only the loss of liberty but the loss of juristic personality and civil rights as well.[1] So also by the ancient common law one guilty of treason or other felony suffered the double penalty of loss of liberty and loss of legal existence denominated civil death.[2] So persistent in juristic thought has been this ancient conception of loss of status or capacity as incident to conviction for crime, that we find a ban, in many

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[6] Gilsonite Construction Co. v. St. Louis, I. M. & S. Ry. Co. (1912), 240 Mo. 650, 144 S. W. 1086; Heman Construction Co. v. Wabash R. Co. (1907), 206 Mo. 172, 104 S. W. 67; Wisconsin, Laws of 1903, Ch. 25; Chicago, M. & St. P. Ry. Co. v. City of Milwaukee (1912), 148 Wis. 39, 133 N. W. 1120.

[7] Cal. Stats. 1899, p. 157; Cal. Stats. 1891, p. 196; Cal. Pol. Code, § 3466.

[8] Cal. Gen. Laws, Art. 2886, § 22.

[1] Sohm's Roman Law, Ledlie (1892), 122.

[2] 1 Bl. Com. 132, 133; 4 Bl. Com. 336; Co. Litt. 199, 200, 132; Avery v. Everett (1888), 36 Hun. 6, 110 N. Y. 317, 18 N. E. 148, 1 L. R. A. 264, 6 Am. St. Rep. 368.

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respects similar to the loss of the *status libertatis* of the Romans and to the *civiliter mortuus* of common law, imposed upon felons by the law of California to-day.

Due to the limited number of adjudicated California cases the status and capacity of convicts in this state is to some extent unsettled. The recent case of *Castera v. Superior Court*[3] has, however, determined the status of convicts as regards civil actions to which the prisoner is a party. The following three questions are suggested by the case: can a convict sue, can a convict be sued, and, finally, if he can be sued, can he defend himself? The court held that section 673 of the Penal Code imposing civil death upon convicts sentenced for life, and section 674 imposing "the loss of all civil rights" upon those in state's prison for less than life, did not prevent a convict from being sued although it did prevent the convict from bringing suit. This decision is in accord with the common law rule.[4] The final question, can a convict defend himself if sued, was not decided by the court. Justice and reason would, however, dictate that he should be allowed to defend a suit brought against him, and a New York court has so held in a decision under a statute similar to ours.[5]

Before attempting more completely to indicate the rights and disabilities of convicts, the sources of these rights and disabilities should be noted. An early California case held that "the disabilities imposed by the common law upon persons attainted of felony are unknown to the laws of this state."[6] No consequences, therefore, follow conviction except such as are declared by the Penal Code, by judicial decisions thereunder and by the state constitution. What are the rights and disabilities so declared? In general, to quote the language of the Supreme Court of California, it may be said that a convict is deprived of "all rights whose existence or enjoyment depends upon some provision of positive law."[7] A specific enumeration of the rights lost includes among others, political and contractual rights, the rights of suffrage, marriage, and inheritance, and finally the right to remain at liberty and enjoy the benefits of one's own labor.[8] The rights and capabilities retained embrace the right to the protection of one's person, the capability of making and acknowledging a sale or conveyance of property, competency as witness in a trial of a criminal action and

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[3] (Feb. 15, 1916), 23 Cal. App. Dec. 61, 159 Pac. 735.

[4] Guarantee Co. v. First Nat. Bank (1898), 95 Va. 480, 28 S. E. 909.

[5] Avery v. Everett (1888), 36 Hun. 6, 110 N. Y. 317, 18 N. E. 148; 1 L. R. A. 264, 6 Am. St. Rep. 368; Bowles v. Haberman (1884), 95 N. Y. 247.

[6] Matter of Estate of Nerac (1868), 35 Cal. 392, 95 Am. Dec. 111.

[7] Estate of Donnelly (1899), 125 Cal. 417, 58 Pac. 61, 73 Am. St Rep. 62.

[8] Cal. Civ. Code, § 1556; 2 California Law Review, 401; Cal. Const. Art. II, § 1, Art. 4, § 25. See supra, n. 7; Cal. Pen. Code, §§ 673, 674.

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in conclusion the benefit of having the statute of limitations cease running against him while in prison.[9]

Having observed the status of the criminal in Roman law, at common law, and finally under California law, it will perhaps be not inappropriate to conclude with a brief suggestion as to what his status ought to be in the future. The tendency of modern juristic thought, as found in the criminal statutes of some of our progressive states, is away from the harshness and barbarism of the Roman and common law. Civil death seems today a somewhat impracticable and doubtful penalty. It is hard to apply and often inflicts a greater injury upon the innocent family or relatives of the felon or even upon the state itself, in tying up his property, than it does upon the convict. And finally, it is not in accord with the modern notion that imprisonment of the felon is rather a means for protecting society, than a punishment imposed upon the individual. A statute similar to that in New York or Kansas, providing for the appointment of a trustee to administer the felon's affairs would as a practical matter accomplish all that is desired, and at the same time might well meet with the approval of many who would be unwilling to see the rules relating to civil death completely abrogated.[10]

H. A. J.

VENDOR AND PURCHASER: NATURE AND WAIVER OF VENDOR'S LIEN.—In *Braun v. Kahn*[1] the vendor sued on a note given for the balance of the purchase price of real estate and obtained a money judgment. He caused an issuance and levy of execution thereon. Later he abandoned his execution lien and commenced an action on the judgment recovered on the note. In this action he claimed a vendor's lien and asked to have the property sold to satisfy this lien. The court, overruling dicta in early California cases,[2] allowed the recovery. The defendant appealed alleging that the plaintiff had waived his vendor's lien by bringing a personal action and obtaining a personal judgment on the note followed by execution thereon. The lien of an unpaid seller of real estate, although suggested by the Roman law covering the sale of personal property, is a creation of the English Courts of Chancery.[3] Many states, including California, following the English cases, hold that the lien exists irrespective of express reservation.[4] "Upon principle,"

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[9] Cal. Pen. Code, §§ 676, 675; Cal. Code Civ. Proc., § 328.

[10] New v. Smith (1906), 73 Kan. 174, 84 Pac. 1030; Kansas Gen. Stat. 1901, §§ 2301, 5776, 5780, 5781; Bowles v. Haberman (1884), 95 N. Y. 247; 2 Revised Statutes of N. Y., § 15; N. Y. Pen. Code, § 707.

[1] (Aug. 18, 1916), 23 Cal. App. Dec. 263.

[2] Fitzell v. Leaky (1887), 72 Cal. 477, 14 Pac. 198; Longmaid v. Coulter (1898), 123 Cal. 208, 55 Pac. 791.

[3] Mackreth v. Symmons (1808), 15 Ves. 329, 33 Eng. Rep. Repr. 778. See also 2 Story, Equity, (13th ed.), p. 563.

[4] 2 Jones on Liens (2nd ed.), § 1063.

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says Lord Eldon, "it goes on this, that a person having gotten the estate of another shall not as between them keep it and not pay the consideration."[5] The question as to what constitutes a waiver of the lien of the vendor of real estate has been the subject of much controversy. The courts are generally agreed that before a person can be said to have waived such a lien, he must have done something inconsistent with the exercise of said lien and evincing an intention to waive it.[6] The difficulty arises when we attempt to discover what constitutes an act inconsistent with the exercise of the lien which amounts to a waiver of it. The better cases agree that the bringing of a suit and obtaining of a judgment thereon do not of themselves constitute a waiver.[7] Suppose, as in the principal case, that the plaintiff goes one step further and levies execution. Does this amount to a waiver of the lien? The appellant's contention was that the vendor, having secured an execution lien on the property in question, had an interest inconsistent with the equitable lien. This apparently sound argument falls when we consider that the execution lien holder is not a bona fide purchaser who takes free from the lien of the vendor. The very nature of the lien in question is based on the theory that a person cannot keep the estate of another until he has paid the full purchase price. So, until the total price has been paid, or the property has been taken from the vendee by an execution sale or a sale has been made by the vendee to a bona fide purchaser, the reason for the lien is still present and the lien should continue to exist. Many cases hold that a sale of the property under execution amounts to a waiver of the lien irrespective of the amount realized thereon.[8] Where, however, there has been no sale of the property the prevailing rule is that the mere levying of an execution thereon does not amount to a waiver of the lien.[9] The decision of the court is sound in principle and is well supported by leading decisions in other jurisdictions.

S. F. H.

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[5] Mackreth v. Symmons (1808), 15 Ves. 329, 344, 33 Eng. Rep. Repr. 778, 783.

[6] Selna v. Selna (1899), 125 Cal. 357, 58 Pac. 16; 2 Jones on Liens (2nd ed.), § 1073.

[7] Graves v. Coutant (1879), 31 N. J. Eq. 763; Elswick v. Matney (1909), 132 Ky. 294, 116 S. W. 718.

[8] Yetter v. Fitts (1887), 113 Ind. 34, 14 N. E. 707; Borror v. Carrier (1905), 34 Ind. App. 353. See also notes in 50 L. R. A. 714, and 13 Ann. Cas. 92.

[9] Supra, n. 7.

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Book Reviews

THE LAW OF PROMOTERS. My Manfred W. Ehrich. Matthew Bender & Co., 511-513 Broadway, New York. 1916. pp. xix, 645.

This work is an exhaustive collection and review of the leading decisions of the courts of the various jurisdictions of the United States and England upon the legal principles regulating the rights and liabilities of promoters. The author has accomplished his purpose of supplying the busy lawyer with a good reference book on this portion of the law of corporations. This publication is one of the necessary results of the rapidly accumulating mass of case law, which forces a writer to devote a whole book to what was previously covered in one or two chapters of a general treatise on company law. Although of great value as a review of the case law down to the present day, the author could have added to the fullness of his accomplishment by placing more emphasis upon the general principles of law and equity upon which the courts proceeded in reaching their conclusions.

M. C. L.

CALIFORNIA LAW OF CORPORATIONS. By Fabius M. Clarke. Bender-Moss Company, 11 City Hall Ave., San Francisco, Cal. 1916. pp. lxxv, 916. $7.50 net.

The law of corporations, depending as it does on local statutes and decisions, is a subject that demands with peculiar force a text book dealing with local applications of that law. The above volume endeavors to answer such a demand. The author attempts no more than to give "California law, pure and simple." The work is necessarily, therefore, not a complete study of the law of corporations, and can fairly be tested only by the extent to which it serves the needs of the bench and bar of this state.

No one, except perhaps a reviewer, reads through local text books, which are merely handbooks to be examined as need arises. They should be, therefore, aptly arranged and clearly indexed,—in a word, thoroughly sign-posted. Mr. Clarke's volume does not perfectly fulfill these requirements. The arrangement seems rather haphazard, which would not be a great matter, if the index led one easily to the place where any given point were discussed. The index does not do so, however, for it consists in vague general headings under which the subheadings referring to the text are not arranged or classified according to any discoverable scheme. For example, to find any given point under the general heading "Directors," the hurried practitioner or judge must look over four pages of catch phrases. In another and similar aspect the book suffers. The author frequently indicates a question that arises incidentally,

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remarking that it will be discussed more fully elsewhere. But where? There are very few cross references. The practitioner is driven to the imperfect index.

The author purports to include all cases bearing upon his subject up to and including 170 Cal., 28 Cal. App., and 7 Cal. Unreported. This is, of course, highly desirable, for often a case of seeming unimportance is a straw to a drowning man. So far as the reviewer can judge, the author has generally kept his promise.

The learned author is aware that the law is a growing science that gains by the white light of criticism. Not content to state the result of code or decisions, he discusses their logicality and sufficiency to serve business or other needs. Some may object to such comment, but the majority will often find in such criticisms much that is clarifying, and in addition those who are interested in the development of the law will also discover food for thought. In particular may be cited the criticism of the familiar doctrines relating to stockholders' liability on page 363.

A. T. W.

Books Received

THE LAND-TITLE REGISTRATION ACT OF THE STATE OF NEW YORK. By Dorr Viele and Joseph C. Baecher. Matthew Bender & Co., 109 State Street, Albany, New York. 1916. pp. 87. $.50.

TRUST LAWS AND UNFAIR COMPETITION. By Joseph E. Davies, Commissioner of Corporations. Government Printing Office, Washington. 1916. pp. xi, 832. $.40.

EIGHTH AND NINTH ANNUAL REPORT OF THE MUNICIPAL COURT OF CHICAGO. By the Municipal Court of Chicago. Dec. 1913 to Dec. 1915. pp. 163.

MAGNA CARTA AND OTHER ADDRESSES. By William D. Guthrie. Columbia University Press, Lemcke & Buechner, agents, 30-32 West 27th Street, New York City. 1916. pp. x, 282. $1.50 net.

LAW OF DOMESTIC RELATIONS. By Edward W. Spencer. The Banks Law Publishing Co., 23 Park Place, New York City. 1916. pp. lxiv, 777. $6.00.

THE LAW OF INTERSTATE COMMERCE AND ITS FEDERAL REGULATION. By Frederick N. Judson. 3rd Edition. T. H. Flood & Co., 214 W. Madison Street, Chicago, Ill. 1916. pp. vii, 1066. $7.50.

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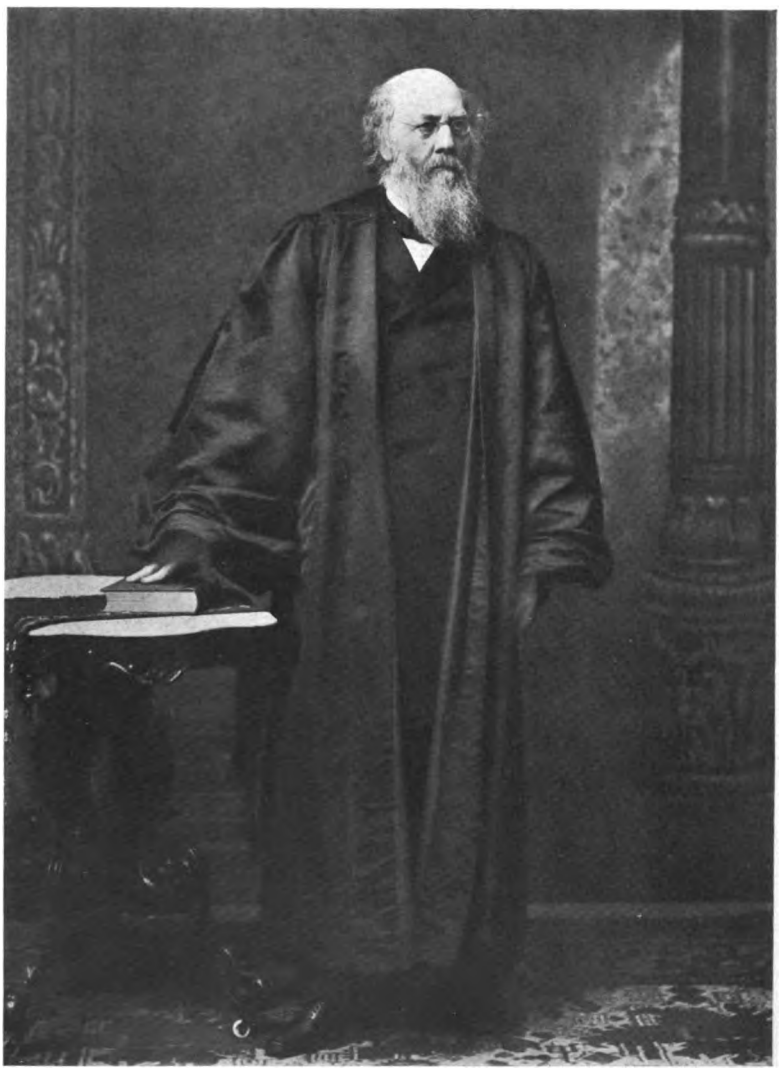

Stephen J. Field

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California Law Review

Volume V JANUARY, 1917 Number 2

Field's Work as Lawyer and Judge in California

THE hundredth anniversary of the birth of Stephen J. Field is a fitting occasion to say a few words concerning a man who contributed perhaps more than any other individual to the creation of the legal system of California. It is not proposed to deal in detail with the events of Justice Field's life. That has been excellently done elsewhere.[1] Nor will the attempt be made to offer a complete estimate of Justice Field's contributions to the jurisprudence of state and nation.[2] It may be useful, however, to say something of his work at the bar and on the bench of California, if it serve only to fix attention upon the fact that though our law is ultimately a result of economic and social force, commanding personalities have none the less been the means through which those forces have acted.

I.

It is a singular and characteristic fact that while Field's personal opinions never obtrude themselves in his decisions, while he never permits an impatient word to escape him, as did his rugged contemporary, Harlan, while he never makes a judicial pronouncement the occasion for giving utterance to a philosophical theory as does his brilliant successor, Mr. Justice Holmes, while his judicial

[1] See the very interesting sketch by Professor John Norton Pomeroy, Jr., of the University of Illinois, in Great American Lawyers, vol. VII, pp. 3-51; also the Introductory Sketch (1881), reprinted in 1895, in the Legislative and Judicial work of Justice Field. Field's own "Personal Reminiscences of Early Days in California, with other Sketches," 1877; 2d Ed., 1893 (privately printed) should be made more generally accessible.

[2] Professor Jones publishes in another part of this Review an article on "Justice Field's Opinions on Constitutional Law" which undertakes a critical discussion of this important phase of Field's work. A less complete treatment by Horace Stern, of Philadelphia, may be found in Great American Lawyers, vol. VII, pp. 52-85, entitled "An Examination of Justice Field's Work in Constitutional Law."

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theory seems to have been that the man should merge himself in the judge, a fairly complete life of Field could be written from the law reports, if all other sources of information should fail. By some strange freak of fortune the most dramatic events in Field's career found their way into the sheep bound volumes where one rarely looks for such things. At the beginning of his life in California we find a considerable portion of the first volume of reports of the new State occupied with an account of his conflict with Judge Turner, his punishment for contempt, his arbitrary disbarment, and his ultimate victory by a series of extraordinary writs.[3] When his judicial career was not far from its close, the one hundred and thirty fifth volume of the United States Supreme Court reports contains the story of the assault on Field by Terry and the killing of the latter by Deputy Marshal Neagle.[4] Earlier volumes of the same reports and of the Federal Reporter give the story of the remarkable scene in the Circuit Court of the United States in which the Terry's defied the court and insulted its judges—the prelude to the case of In re Neagle.[5] And one who was seeking merely the materials for the external facts of the man's life would find in the reports the account of other less dramatic incidents in connection with his romantic career. For example, the fact that he was compelled to make an assignment of his property for the benefit of his creditors, which he tells us in his "Reminiscences" was the penalty for his neglect of his private affairs while he was a member of the Legislature, is duly set forth in the case of Benham v. Rowe.[6]

The reports embracing Field's judicial work give us a much better picture of the man than could be gleaned merely from a narrative of the events of his life, however full. They would not indeed tell us that he was born in Haddam, Connecticut, on November 4, 1816, of revolutionary stock; that he was one of four brothers, David Dudley, Cyrus W. and Henry M. Field, each of whom in his own way achieved great things; that he was educated

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[3] People ex rel. Mulford v. Turner (1850), 1 Cal. 144; People ex rel. Field v. Turner (1850), 1 Cal. 152; Ex parte Stephen J. Field (1850), 1 Cal. 187; People ex rel. Field v. Turner (1850), 1 Cal. 188; People ex rel. Field v. Turner (1850), 1 Cal. 190.

[4] Ex parte Neagle (1890), 135 U. S. 1, 34 L. Ed. 55, 10 Sup. Ct. Rep. 658.

[5] In re Terry (1888), 36 Fed. 419; Sharon v. Hill (1885), 24 Fed. 726; Ex parte Terry (1888), 128 U. S. 289, 32 L. Ed. 405, 9 Sup. Ct. Rep. 77; Sharon v. Terry (1888), 36 Fed. 337.

[6] Benham v. Rowe (1852), 2 Cal. 387.

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in part in the Orient and was familiar to some extent with modern Greek and Oriental languages; that he had it in mind to train himself to become a professor of Greek; that he graduated at Williams College at the head of his class; that he travelled in Europe, was admitted to the New York bar, and practiced in the office of his distinguished brother, David Dudley Field, in New York City, from 1841 to 1848, while the latter was in the midst of his fight for codification. But the essential things that resulted from this heredity and this rather unique training are visible in the opinions which constitute his life work. The logical mind, the conscientiousness in detail, the tenacity of opinion, the reserve in mode of expression, the solidity and massiveness of character, visible in Justice Field's written opinions, betray the Puritan origin; the breadth of view, the openness to new ideas, the ability to adapt himself to a strange and rough environment, are the results of the training.

II.

Field's superior mind and training are apparent from the outset of his career in this State. His contest with Judge Turner has already been mentioned. It is in connection with the various writs brought to set aside his commitment for contempt and his disbarment by that judge that Field's name first appears in the reports. He won a complete triumph, and it may be well believed that the courage, energy and ability displayed in this contest made Field a striking figure in the eye of the bar and of the public. From the date of his first appearance *in propria persona* in People ex rel. Mulford v. Turner, until his resignation to take the office of an Associate Justice of the Supreme Court of the United States, Field's name appears as counsel or judge several times in every volume of the California reports. His career as counsel seems to have been very successful. In sixty-nine appeals in which his name appears as a counsel, he was on the victorious side fifty-two times.[7]

It may be of some interest to follow Field's work as a counsel,

[7] His arguments as counsel are to be found in vols. 1 to 10, inclusive of the California Reports; his work as judge in vols. 8 to 21, inclusive. During the period of his work on the bench of California—from September, 1857, to May, 1863, he wrote three hundred and fifty opinions (including a few dissents). He was absent from the State with the consent of the legislature during a portion of the April term, during the entire July term, and during a portion of the October term, 1859. He became Chief Justice, September 12, 1859, upon Terry's resignation.

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especially in view of the fact that so far as we are aware it has not been done by his biographers in detail, and because it serves in some degree to illustrate the eternal "paradox of form and substance in the development of law."[8] In theory the development of the law is through the application of the rules of formal logic to facts and established principles found in legislation or judicial precedents. In reality it is the result of human forces of which the personalities of the judges are not the least important. Lord Mansfield, the associate of the wits and the great merchants, approached the law from a point of view quite different from that of his successor, Lord Kenyon, who cared nothing for literature or a broad culture, and whose views on trade were those of the landed classes of the eighteenth century. Surely if the law "has to do not with a mere intellectual craft, but with a vital aspect of human and national history,"[9] the personalities of those who make it cannot be neglected. And in studying the personality of a great judge, what he did and thought as a practicing lawyer is bound to shed light upon his subsequent life and opinions.

In Field's case, echoes from his work at the bar can frequently be heard in his utterances as a judge. Thus, is it unfair to say that his experience of judicial arbitrariness in his adventures with Judge Turner had much to do with his theories as to the relations of bench and bar, as to the nature and functions of the judicial power, as to the fundamental question of the position, duties and rights of counsel. In Ex parte Garland,[10] Field delivering the opinion of the court says:

> "The profession of an attorney and counsellor is not like an office created by an Act of Congress which depends for its continuance, its powers and its emoluments upon the will of its creator, and the possession of which may be burdened with any conditions not prohibited by the Constitution. . . . . The order of admission is the judgment of the court that the parties possess the requisite qualifications as attorneys and counsellors, and are entitled to appear as such and conduct causes therein, ... The attorney and counsellor being, by the solemn judicial act of the Court, clothed with his office, does not hold it as a matter of grace and favor. The right which it confers upon him to appear for suitors and to argue causes is something more than a mere indulgence, revocable at the pleasure of the Court, or at the command of the legislature. It is a

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[8] Homes, Common Law, p. 35.
[9] Pollock, The Genius of the Common Law, p. 1.
[10] (1866), 71 U. S. (4 Wall.) 333, 379, 18 L. Ed. 366.

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right of which he can only be deprived by the judgment of the court for moral or professional delinquency."

Of the three authorities cited by Justice Field to support this doctrine, one, Fletcher v. Daingerfield[11] was decided by himself, upon the authority of People v. Turner.[12]

Contrast with Justice Field's theory of the nature of the attorney's office that of Justice Miller, expressed in the dissenting opinion in the Garland case and concurred in by Chief Justice Chase and by Justices Swayne and Davis.

> "The right to practice law in the courts as a profession is a privilege granted by the law, under such limitations or conditions in each state or government as the law making power may prescribe. It is a privilege and not an absolute right. . . . . No reason is perceived why this body of men, in their important relations to the courts of the nation, are not subject to the action of Congress, to the same extent that they are under legislative control in the States or in any other government; and to the same extent that the judges, clerks, marshals, and other officers of the court are subject to congressional action."[13]

In Ex parte Wall,[14] Justice Field's strong feelings upon the subject of the necessity for the protection of the independence of the bar led him to dissent from the opinion arrived at by all of the other justices, sustaining an order striking the name of the petitioner from the roll of attorneys. Though notice had been given the disbarred attorney, the order had been made without any affidavit making a charge against him. It clearly appeared however, that he had been guilty of a most flagrant contempt of court and a violation of his oath as an attorney by advising and aiding in the lynching of a prisoner. Field, in his dissenting opinion, said:

> "What then are the relations between attorneys and counsellors at law and the courts; and what is the power which the latter possess over them; and under what circumstances can they be disbarred? There is much vagueness of thought on this subject in discussions of counsel and in opinions of courts. Doctrines are sometimes advanced upholding the most arbitrary power in the courts, utterly inconsistent with any manly independence of the bar. . . . . The power to disbar attorneys in proper cases . . . . is not to be exercised arbitrarily or tyrannically. Under our institutions arbitrary

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[11] (1862), 20 Cal. 427.
[12] (1850), 1 Cal. 143.
[13] At p. 384 and 385.
[14] (1882), 107 U. S. 265, 27 L. Ed. 552, 2 Sup. Ct. Rep. 569.

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> power over another's lawful pursuits is not vested in any man nor in any tribunal. It is odious wherever exhibited, and nowhere does it appear more so than when exercised by a judicial officer toward a member of the bar practising before him."[15]

If Field had a high opinion as to the dignity and independence of counsel, he had an equally high one with respect to the dignity and independence of the court. Delivering the opinion of the court in Bradley v. Fisher,[16] he laid down the doctrine, against the dissent of Justices Davis and Clifford, that judges of superior courts are exempt from liability to civil action for any acts done in their capacity as judges, though such acts are in excess of their jurisdiction and are done maliciously and corruptly. The only remedy for such abuses lies in the impeachment of the corrupt judge. The natural temper of Field's mind, his intuitional sense of the necessity for the independence of courts in order that justice may be effectively administered, predisposed him toward the doctrine of the immunity of judges. Upon that side of the question, his views represent the prevailing doctrine; upon the other side, the question of the independence of counsel, the views expressed by him in the Wall case are by no means those which have generally commanded the opinion of the courts.[17]

Is it unworthy of the respect which lawyers and laymen alike should entertain for the law and the courts to suggest that a judge's opinions are in part an expression of himself; that one of the elements of Field's strength as a jurist lay in the fact that he made life into law; that he would never have been so great a judge had

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[15] At p. 302.

[16] (1871), 80 U. S. (13 Wall.) 335, 20 L. Ed. 646. Cf. Ex parte Bradley (1868), 74 U. S. (7 Wall.) 364, 19 L. Ed. 214.

[17] It is of interest to note that Justice Davis in the Garland case concurred with Justice Miller's theory that there is no right to practice law, but merely a privilege, while in Bradley v. Fisher he dissented from the view that judges were immune from civil action for malicious and corrupt acts done by them in excess of their jurisdiction. His theory, therefore, of the relation of court and council is sharply contrasted with that of Field. On one side, he recognizes an inherent and vaguely defined power on the part of the court over the conduct of counsel, on the other hand he views this inherent power as one that must be exercised with caution, for the arbitrary judge becomes merely a private citizen when he exceeds his jurisdiction and acts with malice. It would be an interesting study to work out the different types of individualism represented by the Field and by the Davis theory. In addition to the Garland case the Wall case, and Fletcher v. Daingerfield above cited, see Ex parte Robinson (1873) 86 U. S. (19 Wall.) 505; 22 L. Ed. 505; In re Green (1891), 141 U. S. 325, 35 L. Ed. 765, 12 Sup. Ct. Rep. 11.

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he not been a man with a mind sensitive to experience? The solidity of Field's judicial character, his love of logic and order, his admiration for the system of the common law, made it impossible that he should be the slave of prejudice. The grand manner was his; the judicial style that rarely erred by overemphasis, by impatience, by smartness, by inattention to detail. But he was no logical machine. Had his ideas not been profoundly influenced by the arbitrary and violent conduct of Judge Turner of which he was the innocent victim, had this experience not served to increase his hatred of tyranny and oppression in every form, we may well be permitted to express a doubt whether in spite of his learning and industry he would have achieved his great work in the history of American law.

III.

Another case argued by Field before the Supreme Court which had something to do with his later views is that of Hicks v. Bell.[18] In that case the Supreme Court held that "the mines of gold and silver on the public lands are as much the property of this State by virtue of her sovereignty as are similar mines in the lands of private citizens," and that "the several States of the Union, in virtue of their respective sovereignties, are entitled to the *jura regalia* which pertained to the King at common law." This theory was not suggested by counsel on either side, and its author, Judge Heydenfeldt seems to have relied upon authorities from Pennsylvania and New York, where, of course, there had never been public lands of the United States.[19] In Biddle Boggs v. Merced Mining Company at the January term of the court in 1858, Burnett, J., delivered an opinion with which Terry, C. J., concurred specially and from which Field, J., dissented. While Justice Burnett criticized the case of Hicks v. Bell, he thought the precious minerals continued to belong to the United States, notwithstanding a patent had issued, by reason of its proprietorship in the gold and silver, though not by virtue of its sovereignty. Terry, C. J., declined to express an opinion as to Hicks v. Bell, but found that he could concur with his associate on the ground that, whether the title was in the State or in the United States, plaintiff could not claim the gold found within the limits of the United States patent. Field's dissenting opinion is not reported. A rehearing was

[18] (1853), 3 Cal. 219.
[19] Lindley, Mines and Mining, § 21.

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granted in the case, and a change in the court having been made by the retirement of Terry and Burnett and the selection of Baldwin and Cope, the former decision was reversed at the October term, 1859. Field's opinion determines the question, however, without reference to the decision in Hicks v. Bell. He assigned as a reason for not discussing it the fact that Justice Baldwin had been counsel for the respondent, and that the court desired to have a question of such importance decided by a full court.[20]

The occasion to discuss Hicks v. Bell soon came in Moore v. Smaw.[21] Field's opinion in that case places the law upon this important matter where it has ever since remained. Speaking of Hicks v. Bell, he says:

> "That decision has not met the approbation of the profession or retained the approbation of the distinguished Judge[22] who delivered it. The question as to the ownership of the minerals was not raised by counsel, and its determination was not required for the disposition of the case."

He proceeds to show the court's fallacy in supposing that the states of the American Union had succeeded to any except the political rights and authority of the British Crown, and in confusing the King's personal prerogative with his political powers. He argues very forcibly that the English rule itself "had in truth its origin in an arbitrary exercise of power by the King, which was at the time justified on the ground that the mines were required as a source of revenue."

Possibly Hicks v. Bell might have been overruled if Field had never been counsel in the case, for to our present day view it was hopelessly wrong. But in our mental appraisement, the fact must not be forgotten that it represents a lost cause, and though a Matthew Arnold may rejoice that Oxford is the home of lost causes, the work-a-day world has little to say in their favor. It was a singular fate, however, that Hicks v. Bell should have been repudiated by the mind that gave it birth, and that its ultimate

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[20] (January Term 1858 and Oct. Term 1859), 14 Cal. 279.

[21] (1861), 17 Cal. 199.

[22] Heydenfeldt, who as counsel in the Biddle Boggs case, had been confronted by the Frankenstein he had created in Hicks v. Bell. Justice Baldwin, writing in the Sacramento Union of March 6, 1863, points out some of the mischief to which the decision in Hicks v. Bell had led. Miners claimed the right to go upon private land to discover the gold which the State reserved, a claim naturally resisted by the owners of the lands. The decision in Moore v. Smaw put an end to this condition.

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fate should be decided by a court of three judges, two of whom, Field, and Baldwin, must have had about as little sympathy with its doctrine as any lawyers in California.

IV.

In his Introductory Sketch, previously referred to, the late Professor John Norton Pomeroy says of Justice Field's decisions settling the foundations of the law of mortgage in California:[23]

> "His opinions explaining, advocating and enforcing this single equitable conception of the mortgage as purely a hypothecation, as creating no estate in the land, as a mere lien and not a *jus ad rem* nor a *jus in re*, have not been excelled in their clearness of statement and cogency of argument by those of any other court which has maintained the same view, and they have undoubtedly done much to promote its acceptance in other states. No opinions upon the subject are more instructive for the student in all parts of the country."

How much of Justice Field's doctrine upon the subject of the nature of the mortgage is the result of his work as an advocate? Of course, neither quantitatively nor qualitatively can we assay his judicial work in this respect with any degree of accuracy. But it is a matter of some interest to observe that the propositions argued by him as counsel even unsuccessfully are frequently adhered to by him with tenacity through the course of his long judicial career. Maitland's now trite saying that "taught law is tough law" may well be applied to Field's case. The law that he sought to teach the courts is, indeed, "tough."

Let us look at a typical instance. In Lee v. Evans[24] and in Low v. Henry,[25] he argued what is long since elementary doctrine, that a deed though absolute on its face is but a mortgage if intended as security. In the first of these cases, Lee v. Evans, Field did not advance the proposition dogmatically. He says in the course of his argument: "But whether parol evidence is admissible in the absence of any of these circumstances (of fraud, accident or mistake), there is some conflict in the authorities, although the weight of the authorities, is, I think, in favor of its admissibility," and he proceeds to cite the cases. The court held against his contention, though he won the appeal upon a point of pleading.

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[23] At p. 38.
[24] (1857), 8 Cal. 424.
[25] (1858), 9 Cal. 538.

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By a psychological process familiar to all advocates, that which was advanced with hesitation in Lee v. Evans is urged with confidence a year later in Low v. Henry, but the point meets the same fate.

On the first occasion when the question arose before the court of which Field was a member, he wrote a dissenting opinion in the case of Johnson v. Sherman, not reported.[26] In Pierce v. Robinson,[27] however, the personnel of the court having changed, the question is reconsidered, Lee v. Evans and Low v. Henry overruled upon this point, and to use Field's language—somewhat significant in view of the rather hesitating manner in which he spoke in Lee v. Evans only two years before—"the doctrine of this court (placed) in harmony with the received doctrine of courts of equity on this subject everywhere else." The "weight of authorities" of 1857 has in 1859 become the "received doctrine . . . . everywhere." Many years later in Peugh v. Davis,[28] the decision, and in part the language, of Pierce v. Robinson is reiterated in the Supreme Court of the United States.

Other cases argued by Field before the Supreme Court show that much of his work of laying the foundation of the law of mortgage in California was done before he ever reached the bench. Indeed, the first case in the California reports which discusses the theory of the mortgage was one in which Field was not only counsel but was also one of the plaintiffs.[29] The case arose out of a sale under a power in a mortgage given by Field, and was an action brought by the latter and the trustees to whom in December, 1850, he had made the assignment for the benefit of his creditors previously mentioned, to set aside sales made by the mortgages under the power to themselves. It is interesting to note that the language attributed to Field in the argument to the effect that "The equity of redemption is inseparable from a mortgage and cannot be disconnected even by agreement of the parties,"[30] is almost precisely the language used by him twenty-five years later in deliver-

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[26] Referred to in Arguello v. Edinger (1858), 10 Cal. 150, 160. Why is Johnson v. Sherman not reprinted in California Unreported Cases?

[27] (1859), 13 Cal. 116, 124-125.

[28] (1877), 96 U. S. 332, 24 L. Ed. 775.

[29] Benham v. Rowe (1852), 2 Cal. 387. The earlier cases of Woodworth v. Guzman (1850), 1 Cal. 203; Walker v. Hauss-Hijo (1850), 1 Cal. 184, and Moore v. Reynolds (1850), 1 Cal. 351, though they mention mortgages do not discuss their principles at all.

[30] At p. 401.

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ing the opinion in Peugh v. Davis,[81] "It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage."

The Court held in Benham v. Rowe that where a mortgagee becomes purchaser under a power of sale, the equity of redemption still attaches to the property in favor of the mortgagor. Probably Field had in mind the proposition there established that a mortgagee may not purchase at his own sale under power, when he said in McMillan v. Richards:[82] "The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance." And he had in mind the circumstances in Benham v. Rowe when in Fogarty v. Sawyer,[83] in the very act of establishing the doctrine that a sale could be made under a power in a mortgage, notwithstanding Section 260 of the Practice Act he said: "in the present case no question is made as to the regularity of the proceedings taken by the mortgagee, or the good faith of the sale made by him."[84]

The argument in Benham v. Rowe indicates a thorough study of the law respecting sales under powers, and the influence of that study is reflected in the cases in which Field established the existence of the power of sale mortgage and the trust deed as security.[85] Professor Kidd suggests in his valuable article upon Trust Deeds and Mortgages in California,[86] that the language of Section 260 of the Practice Act, reenacted in Section 744 of the Code of Civil Procedure, might have warranted a construction which would have forbidden a sale under a power. The remark is very pertinent, and, indeed, suggests the more natural interpretation of the statute, if merely its language be looked at. The section provides that "a mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale." But Field's personal familiarity

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[81] (1877), 96 U. S. 332, 337, 24 L. Ed. 775.

[82] (1858), 9 Cal. 365, 411. This is the general rule. Jones, Mortgages (5th ed.), § 1876.

[83] (1861), 17 Cal. 589.

[84] See, also, his opinion in Bell Mining Company v. Butte Bank (1895), 156 U. S. 470, 478, 39 L. Ed. 497, 15. Sup. Ct. Rep. 440, where similar language is used about regularity and good faith.

[85] Fogarty v. Sawyer (1861), 17 Cal. 589; Koch v. Briggs (1859), 14 Cal. 256.

[86] 3 California Law Review, 368.

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with the power of sale mortgage had shown him that equity possessed ample means for the protection of the mortgagor, if there is injustice or oppression, and his legal sense taught him the utility in the California of that day of a form of security whereby the creditor could have a better guaranty, in view of the fluctuating values of land, than was afforded by the judicial sale with its six months' period of redemption. He had been forced, probably against his inclination, to follow in McMillan v. Richards the rule established in the earlier cases, that where a mortgagee sells at judicial sale, he sells like any other judgment creditor subject to the right of redemption, and Fogarty v. Sawyer was a natural supplement to that doctrine.

V.

What was thought by business men of the doctrine that the equity of redemption continues after the sale of foreclosure, is expressed in a little book by James de Fremery on Mortgages in California.[87] Mr. de Fremery writes as a business man, who had experience in investing for capitalists in California property, and from the considerable portion of his little book which is devoted to aliens, it would seem that he was writing largely for the instruction of foreign investors. At p. 73, Mr. de Fremery says:

> "In this State the mortgagor has a statutory right of redemption after sale under foreclosure, and so has each of his creditors, holding a subsequent lien by judgment or mortgage. . . . . It may be doubted whether the right of redemption, except as regards sales of property under execution for a deficiency, has been rightly held applicable to sales of mortgaged premises under foreclosure of the mortgage. In a strictly legal point of view it would appear unnecessary to stretch the meaning of the section so as to include such sales whilst certainly in equity the mortgagor can hardly be considered entitled to so much leniency. He has known when the debt would be due; he has had it in his power to avail himself of his equitable right of redemption until the suit in foreclosure, of which he had due notice, resulted in a sale of the premises mortgaged. He had ample time to save his estate, if he had the will and the means. . . . . In but very few cases this right of redemption from sales on foreclosure of mortgage has been availed of by the parties in interest. The right alluded to has therefore been of very little benefit to mortgagors and at the present day this same statutory right of redemption

[87] Mortgages in California, a Practical Essay, by James de Fremery. San Francisco: J. J. Le Count, 1860.

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> operates greatly to their disadvantage, for lenders of money want a much larger margin in the value of the security than they would otherwise require, on account of the delays which may result from it."[38]

The business needs of the community were met by the decisions in Koch v. Briggs sustaining the deed of trust as a form of security, and by Fogarty v. Sawyer recognizing the validity of the sale under a power in a mortgage. Justice Field was much better prepared to write these opinions, he understood better the real needs of the community, because this part of the law had been in a real sense a part of his life. The jurist no less than the poet or the painter or the sculptor, though subject of course to different limitations, embodies forth his own experience. The mere closet philosopher, the arid compiler of precedents, the mechanical repeater of legal formulae, never creates law, never embodies in legal institutions the needs of mankind struggling for utterance.

Scarcely had Field left the bench of California to enter upon his wider career as a Justice of the United States Supreme Court, than the effect of Fogarty v. Sawyer was much impaired by the dictum in the case of Cormerais v. Genella,[39] suggesting that possibly a right of redemption might exist where a sale was made under a power. This dictum which was squarely opposed to the passage in Fogarty v. Sawyer quoted above, which says that the title passes when the deed is made under the power, has served to prevent the general use of the power of sale mortgage. It is impossible to estimate the cost that mortgagors have paid for this *obiter dictum*. It is safe to say, however, that each has paid something for it; that every mortgagee, consciously or unconsciously, has taken into account the possibility of the difficulty in the enforcement of his mortgage in making his loan. If railroads and good roads are essential to the development of civilization, a clear and definite system of law is equally indispensable. The importance of the development of legal concepts even from the material point of view can hardly be overestimated. Field's judicial mind firmly held to the necessity of clearness in legal conceptions. He rarely indulged in the luxury of speculation as to what might or might not be the law with reference to situations not presented.

It was perhaps unfortunate that Koch v. Briggs was decided

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[38] Compare Professor Kidd's conclusions in 1915 with Mr. de Fremery's in 1860, 3 California Law Review, 400-403.

[39] (1863), 22 Cal. 116.

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before Fogarty v. Sawyer, for in the former case there was too much emphasis laid on the passage of the legal title under the deed of trust, and upon the proposition that there could be no foreclosure under such a conveyance. The obvious distinction between Koch v. Briggs and the ordinary mortgage was that the legal title passed to the trustee in the trust deed, whereas it had been decided that it did not in the case of the mortgage, and it was this obvious distinction that was emphasized. Field himself many years later in Bell Mining Co. v. Butte Bank[40] reconsidered the positions assumed in Koch v. Briggs, and treats the two forms of security as practically identical. He cites the Fogarty and the Koch cases as establishing the same principle, omits from his quotation of the former the statement that the instrument is a mortgage, speaks of "trust deeds in the nature of mortgages," and recognizes that the power of sale in the trust deed as in the mortgage is "an additional authority to the grantee or mortgagee." He makes it positively clear in this case that where there is a sale under a power in a mortgage, the mortgagor's right "is wholly divested, embracing his equity of redemption."

Field's most elaborate decision on the subject of the law of mortgage was McMillan v. Richards[41] in which was finally established the proposition that no title, either legal or equitable, passes to the mortgagee in California. The point was by no means clear before that decision, as a reading of the very able argument of John Currey, reported with the case, will show. Field's views upon the subject may well have been affected by his study in the case of Low v. Henry, and in the earlier case of Bryan v. Sharp,[42] where he had succeeded in maintaining the proposition that the mortgagee had no interest in the mortgaged land capable of being sold at sheriff's sale.

Dutton v. Warschauer,[43] where Field decided that the legal title did not pass even in the case of mortgages given before the Practice Act of 1851, was covered by the case of Ferguson v. Miller,[44] where Field himself had contended for the proposition which he declared unsound in the Dutton case. His contention, indeed, had received scant courtesy from Heydenfeldt, who

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[40] (1895), 156 U. S. 470, 39 L. Ed. 497, 15 Sup. Ct. Rep. 440.
[41] (1858), 9 Cal. 365.
[42] (1854), 4 Cal. 349.
[43] (1863), 21 Cal. 609.
[44] (1854), 4 Cal. 97.

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delivered the opinion. It is worthy of note that Field did not refer to this precedent in his decision in Dutton v. Warschauer. Possibly he thought it incorrect, for he recognizes that mortgages before the statute may sometimes be treated as conveyances, "when that character is essential to protect the just rights of the mortgagee," though mortgages since the Practice Act must always be considered as mere securities. It is characteristic of Field that he should have made this reservation. His intellectual honesty led him to doubt whether his position in that case had been fundamentally sound, but he had argued the point with sincerity as he argued all points. The reservation that in mortgages prior to 1851 the legal title might be considered to pass when "essential to protect the just rights of the mortgagee" left him a ground for justifying his argument in the earlier case.[45]

VI.

Even in trifling matters, the influence of Field's work at the bar may sometimes be traced. One can imagine for example, that he had in mind his own experiences in practice (possibly in the case of Live Yankee Company v. Oregon Company),[46] when he gave utterance to one of the very few examples of humor to be found in his opinions. Like every other judge, with a proper conception of the judicial office, including Field's own brilliant associate, the author of "Flush Times in Alabama," the professional humorist, Joseph G. Baldwin, he was never guilty of the undignified practice of writing so-called humorous opinions, nor, indeed, of the hardly less dignified and more reprehensible practice of making his judicial decisions the vehicle for the expression of his personal predilections and opinions. The most scrupulous purist will, however, forgive his remarks in Fuller v. Hutchings, in answer to an argument that a new trial should have been granted for surprise: "The surprise alleged is only that the law was different from what the attorneys supposed it to be—a state of feeling which, in numer-

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[45] Clark v. Baker (1860), 14 Cal. 612, was a case where Field deemed that the "just rights of the mortgagee" required the instrument to be treated as a conveyance, though executed after the Practice Act; Sands v. Pfeifer (1858), 10 Cal. 258, was another. A complete discussion of Field's theory of the mortgage would be of value.

[46] (1857), 7 Cal. 40.

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ous instances, under like circumstances, has been experienced by other counsel, but has never availed to obtain a new trial."[47]

Was the "other counsel" possibly Field himself?

VII.

In the hundred years since Field's birth, the world has swung far, and since his accession to the bench in September, 1857, our law has undergone many changes. The law of corporations, of public service, of employer and employee, to mention but a few examples, has developed in new directions since that time.[48] Courts, in 1857, had not yet enmeshed themselves in the maze of arbitrary rules of procedure and evidence from which, sometimes only through legislative aid, they are again succeeding in extricating themselves. The vital principles of the law were not yet in danger of being choked under an undergrowth of statutory detail and ill-reasoned precedents.[49] The great social questions of to-day were not demanding treatment from the courts. In spite of changes, however, Field's fundamental views of the judicial office in many respects bear a strikingly modern aspect. We have already mentioned his pronounced views upon the importance of an independent bench and an independent bar. Closely connected with this problem of relations of bench and bar is that of the relation of procedure of substantive law. Field's views on this question are in effect those of Professor Pound and the American Judicature Society.

Rules of court procedure are to him means to an end, administrative rather than legislative.[50] Such artificialities as an objection

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[47] (1858), 10 Cal. 523, 526. Another example of Field's humor may be found in Touchard v. Crow (1862), 20 Cal. 150, 164, where he comments upon the conduct of a trial judge who went through the solemn process of charging himself as a jury.

[48] For an account of the development of the law between 1830 and 1860, see Warren, History of the American Bar, 446 et seq.

[49] In 1845, twelve years before Field went on the bench, it was estimated that there were 1608 volumes of English and American reports, (Wallace, The Reporters, Preliminary Remarks, § 20). In 1915, there were over 9,000 volumes of reports of United States courts, not to mention those of the English, Irish, Scotch and Colonial courts. (Dean Harlan F. Stone, Law and Its Administration, p. 211).

[50] In Adams v. Town (1853), 3 Cal. 247, and in Brummagim v. Boucher (1856), 6 Cal. 17, as counsel he successfully employed writs of error. The only occasion upon which such writ seems to have been used since the Code is Ex parte Thistleton (1877), 52 Cal. 220.

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to an indictment for murder, because it is not stated that the wound was "mortal,"[51] or an objection to the validity of a conviction, because one of the jury separated from the rest, while he helped to carry out a fainting witness,[52] he readily brushed aside. On the other hand, though he knew how to meet that "subtilty that is fine" but "unrighteous," and that "wresteth the open and manifest law," he could employ equally well that "subtilty" which is "wise and judgeth righteously."[53] An evasive allegation or denial could not escape his lynx-like eye.[54] Though now and then he reads a homily on bad pleading, as in Green v. Palmer,[55]—for, like Chief Justice Hobart, he, too, thought that "pleading is not talking"—he almost invariably decides cases on their merits. It is true that during the earlier part of his judicial career, he rather freely dismissed appeals for failure to produce proper records. But he was curing an intolerable abuse, causing annoyance, loss and confusion.[56] The stringent treatment soon effected a cure.

Typical of the way he handled such rules as are essential for the orderly discharge of judicial business is the case of Barrett v. Tewksbury.[57] In that case, the court, through Field, announced that in all pending appeals, in which the terms of the Practice Act respecting records on appeal had not been complied with, counsel should be permitted to file amended records, but that in the future the rule would be rigorously enforced. Could there be a clearer

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[51] People v. Judd (1858), 10 Cal. 314.

[52] People v. Lee (1860), 17 Cal. 76.

[53] Chief Justice Hobart in Pitts v. Jones (1615), Hob. 121, 125, 80 Eng. Rep. R. 271. Cf. Thayer, Treatise on Evidence, p. 290; and Chief Justice Beatty's remark in Dennis v. Bint (1898), 122 Cal. 39, 49, 54 Pac. 378, about meeting a technicality with a technicality. The quaint force of Chief Justice Hobart's language warrants further quotation. "And so I commend the Judge, that seems fine and ingenious, so it tend to right and equity, and namely, that in these cases of captious misnomers doth mold the small disorders of the name to make good the contract and bargain. And I condemn them that either out of pleasure to shew a subtil wit will destroy, or out of incuriousness or negligence will not labor to support the act of the party by the art or act of the law."

[54] See, for example, Letters, alias Cady v. Cady (1858), 10 Cal. 533, where he points out that the allegation that plaintiff and defendant lived together *"as* husband and wife" is not an allegation that they were married. See his remarks on evasive denials in S. F. Gas Co. v. S. F. (1858), 9 Cal. 453, and in Curtis v. Richards (1858), 9 Cal. 33.

[55] (1860), 15 Cal. 411.

[56] See, e.g., Wing v. Owen (1858), 9 Cal. 247; Marlow v. Marsh (1858), 9 Cal. 259; Meerholz v. Sessions (1858), 9 Cal. 277; People v. Edwards (1858), 9 Cal. 286; Waltham v. Carson (1858), 10 Cal. 178 (frivolous appeal dismissed with 10 per cent damages); McGill v. Rainaldi (1858), 11 Cal. 391 (the same penalty).

[57] (1860), 15 Cal. 354.

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recognition of the administrative nature of procedural statutes than by this temporary suspension of its effect? In People v. Lee,[58] speaking of a statute fixing the time for presentation of a bill of exceptions, he says: "The statute is not unlike a rule of Court, to be enforced to advance the ends of justice, and not to prevent their attainment." He held that a failure to comply with the requirement as to time of presentation did not absolutely require that the bill be refused settlement.

The doctrine which regards statutes respecting procedure as directory rather than mandatory is usually the corollary of a theory that courts possess inherent powers, independently of legislative action. A great English jurist, speaking of this rule-making power, says, "The best of all would be that the courts should never be wanting in the knowledge of their own inherent powers and the courage to use them."[59] Field both knew and dared to use these powers. If anything, he insisted too strongly upon the doctrine of the inherent powers of courts, as in Houston v. Williams,[60] where he denied the legislature's power to direct the judges to file written opinions.

Save in the matter of the independence of the judiciary, Field was not disposed, while a member of the California court, to insist on a strict construction of the legislative powers under the constitution. His dissenting opinion in Ex parte Newman[61] is a forceful expression of the duty of courts to abstain from substituting their own judgment for that of the legislature in considering the constitutionality of statutes.

> "The judiciary cannot say that the legislature was mistaken, and therefore the act unconstitutional without passing out of its legitimate sphere, and assuming a right to supervise the exercise of legislative discretion in matters of mere expediency . . . . Its assumption would be usurpation, and well calculated to lessen the just influence which the judiciary should possess in a constitutional government."[62]

And in his opinion in McCauley v. Brooks[63] and his dissenting opinion in Lin Sing v. Washburn,[64] he shows how peculiarly the

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[58] (1860), 14 Cal. 510.
[59] Pollock, The Genius of the Common Law, p. 74.
[60] (1859), 13 Cal. 24.
[61] (1858), 9 Cal. 502.
[62] At p. 529.
[63] (1860), 16 Cal. 11, 56.
[64] (1862), 20 Cal. 534, 586.

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question of the constitutionality or unconstitutionality of a statute frequently turns upon a question of degree. The doctrine is not stated in the brilliant literary form which Holmes gives it in Ellis v. United States[65] and in Haddock v. Haddock,[66] but the thought is essentially the same. Field would have concurred with every word that James Bradley Thayer used in the following passage in his sketch of John Marshall:[67]

> "Courts, as has often been said, are not to think of the legislators, but of the legislature,—the great, continuous body itself, abstracted from all the transitory individuals who may happen to hold its power. It is this majestic representative of the people whose action is in question, a co-ordinate department of the government, charged with the greatest functions, and invested, in contemplation of law, with whatever wisdom, virtue and knowledge the exercise of such functions require."

VIII.

A crucial test, whereby to measure his judicial character is afforded by a judge's attitude towards the theory of precedent.[68] Between Lord Kenyon, who found it his "comfort" to "servilely tread" in the "footsteps" of his predecessors,[69] and Lord Stowell, who thought judges and lawyers overfond of precedent, there lies a wide chasm.[70] One who thinks upon the question must, indeed, recognize a certain necessary and psychological basis for the existence of the rule *stare decisis*, aside from its social importance. As Sir Frederick Pollock says, even the child appeals to precedent when it pleads "mamma lets me do it."[71] Field recognizes the double foundations,—the habit of the human mind and the needs of certainty in business—on which the doctrine rests. He says:

> "I do not assent to the proposition announced in Bryan v. Berry[72] that the decisions of other courts are authority and to

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[65] (1906), 206 U. S. 246, 260, 51 L. Ed. 1047, 27 Sup. Ct. Rep. 600.

[66] (1905), 201 U. S. 562, 631, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525. Compare his remarks in Burnett v. City of Sacramento (1859), 12 Cal. 76, 84, "no rule could be adopted which would work absolute equality. An approximation is all that can be obtained," with Holmes's dictum that "constitutional law like other mortal contrivances has to take some chances." Blinn v. Nelson (1911), 222 U. S. 1, 7. 56 L. Ed. 65, 32 Sup. Ct. Rep. 1.

[67] At p. 108-9.

[68] See diverse views on this subject mentioned by the writer, "Changing Conceptions of the Law," 3 California Law Review, 440, 450.

[69] Bauerman v. Radenius (1798), 2 T. R. 663, 668; Hosmer, C. J., in Card v. Grinman (1823), 5 Conn. 164, 168.

[70] W. W. Story, Life and Letters of Joseph Story, Vol. I, p. 556.

[71] Pollock, "Laws of Nature and Laws of Man," in Essays on Jurisprudence and Ethics, p. 56.

[72] (1856), 6 Cal. 398.

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> be respected only from the reasoning upon which they are based. The proposition is not sound except in a very restricted sense. The law is a science whose leading principles are settled. They are not to be opened for discussion upon the elevation to the bench of every new judge, however subtle his intellect, or profound his learning, or logical his reasoning. Upon their stability men rest their property, make their contracts, assert their rights and claim protection. . . . . It is possible that some intellects may rise to the perception of absolute truth and be justified in questioning the general judgment of the learned of mankind. But before the legitimate and just inference arising from the general acquiescence of the learned can be avoided, the error in the principles should be clearly shown. We should not blindly adhere to precedents, nor should we more blindly abandon them as guides."[73]

The perpetual antimony of the law, the conflict between law and equity, between form and substance, between statute and common law, between logic and experience, between legislation and interpretation finds illustration in this passage, as it does in the entire legal and judicial career of Stephen J. Field. The theory of an unchanging science of law, of an artificial perfection of reason has to be reconciled with that of the theory that the judge shall not in all cases "blindly" follow precedent. Fortunately for the pioneer State, Field possessed that respect for the system of the common law which every true lawyer must possess; fortunately also he had a learning in the law rivalled by few American judges of his day.[74] But most fortunate of all, his active life had been a part of the life of the State, and he had the rare power of translating life into law. If law is ultimately a product of social and economic forces, it is through great personalities, such as that of Field, that these forces must find their expression.

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[73] Ex parte Newman (1858), 9 Cal. at p. 527.

[74] An enumeration of the contemporary American judges is sufficient to indicate that even in the matter of legal learning Field ranked very high among these great men. The Supreme Court of the United States in 1857 was composed of the following members: Taney, McLean, Wayne, Catron, Daniel, Nelson, Grier, Campbell, and Clifford. On the state benches we find such names as Shaw of Massachusetts, Denio of New York, Storrs of Connecticut, Green and Williamson of New Jersey, Ames of Rhode Island, Redfield of Vermont, Lewis of Pennsylvania, Caton of Illinois, Lumpkin of Georgia, Rice of Alabama, English of Arkansas, Bartley of Ohio, Gilpin and Harrington of Delaware, Tenney of Maine, Perley of New Hampshire, O'Neall of South Carolina, Allen of Virginia, Scott of Mississippi, Nash of North Carolina, Wheat of Kentucky, Caruthers of Tennessee, Martin of Michigan, Le Grande of Maryland, Merrick of Louisiana, and Perkins of Indiana.

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Bagehot in his essay on Macaulay speaks of men who "think literature more instructive than life."[75] "There is a whole class of minds," he says, "which prefers the literary delineation of objects to the actual eyesight of them. To some life is difficult. An insensible nature, like a rough hide, resists the breath of passing things; an unobservant retina in vain depicts whatever a quicker eye does not explain. But anyone can understand a book; the work is done, the facts observed, the formulae suggested, the subjects classified."

Field's mind was the antithesis of all that is described by Bagehot as characteristic of Macaulay. It was a first-hand, not a second-hand mind; it was one not fed on pre-digested food; it was that of the man of affairs dealing with things of the mind, not that of the closet student dealing with affairs. Field looked at life directly; he required no smoked glasses.

Orrin K. McMurray.

Berkeley, California.

[75] Thomas Babington Macaulay in Collected Works, ed. by Mrs. Russell Barrington, Vol. II, p. 94.

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Justice Field's Opinions on Constitutional Law

I.

Commerce Under the Constitution.

THE act of Congress of March 3, 1863, entitled "An Act to provide Circuit Courts for the Districts of California and Oregon," authorized the appointment of one additional Associate Justice of the Supreme Court of the United States. Stephen J. Field, then Chief Justice of the Supreme Court of California, was appointed by President Lincoln to fill the position thus created, and was allotted to the district covering California and Oregon.[1] Justice Field's first opinions appear in the 23rd volume of Wallace's Reports, and, down to 163 United States, covering nearly one hundred volumes, every volume, except three, namely, 23 Wallace, 126 United States and 135 United States, contains opinions written by him. These opinions cover many branches of both public and private law.

Justice Field's service in the Supreme Court extended over a period of thirty-four years, from May, 1863, to December, 1897, extending over a period longer than that of any other justice. The two judges, whose terms almost equalled that of Justice Field, were Chief Justice Marshall and Justice Harlan. His appointment came in the midst of the Civil War, and Justice Field had to deal with the great problems growing out of that struggle. The Reconstruction period furnished its series of important cases. The adoption of the Thirteenth, Fourteenth, and Fifteenth Amendments opened up a vast field of new constitutional construction. The economic and industrial expansion of the eighties and nineties presented numerous questions which came before the Supreme Court for final review. In the judicial consideration given to these cases Justice Field took a part, always active, important and influential, and frequently commanding.

When Justice Field took his place on the bench at Washington, the Supreme Court was presided over by Chief Justice Taney, and the Associate Justices thereof were Justices Wayne, Nelson, Clifford, Miller, Catron, Grier, Swayne, and Davis. He served throughout

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[1] (1863), 2 Black 7.

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the terms of Chief Justices Chase and Waite, and during nine years of the term of Chief Justice Fuller. Other justices who sat with him, for longer or shorter times, during his extended term of service were Justices Strong, Bradley, Hunt, Harlan, Woods, Matthews, Gray, Blatchford, L. Q. C. Lamar, Brewer, Brown, Shiras, Jackson, White, and Peckham. The mention of these names gives the personal color of the court.

The purpose of these papers is to make a study of the constitutional opinions of Justice Field. Characterization and appreciation of his work will come better after, rather than before, the examination of his opinions.

The subject of constitutional construction before the Supreme Court during Justice Field's term which demanded the largest attention was that of interstate and foreign commerce. The close of the Civil War was attended with expanding commercial interests, and consequent conflicting views of the sphere of state and national control of the subject of commerce show themselves. Before the year 1840, the construction of the commerce clause of the Constitution[2] had been involved in but five cases submitted to the Supreme Court. In 1860 the number of cases in the court on that subject had increased to twenty; in 1870 the number was thirty; in 1880 the number had increased to seventy-seven; in 1890 it was one hundred and forty-eight; and by the time of Justice Field's retirement the number was not less than two hundred.[3]

Justice Field's position in the determination of all questions involving the conflicting jurisdiction between state and nation on the subject of interstate and foreign commerce was clear, logical and undeviating. It has been a subject that has perplexed the court on many occasions, and the court has not found it easy to establish a rule or especially, to apply a rule when established to difficult and delicate adjustments of jurisdiction. One of Justice Field's earliest opinions was in the well known case of The Daniel Ball.[4] Several important principles were laid down in this case, making it a leading authority. It is most frequently cited for its definition of what constitutes the navigable waters of the United States. Wherever interstate and foreign commerce extends, the

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[2] U. S. Const. Art. I, § 8: "Congress shall have power . . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

[3] Prentice & Egan, Commerce Clause of the Federal Constitution, 14.

[4] (1870), 10 Wall. 557, 19 L. Ed. 999.

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power of the United States goes with it for its protection. The authority of Congress is not limited to navigation on the ocean, or to the great rivers, like the Mississippi, Ohio, and Hudson, but extends to all lakes and streams, which by their connections make channels of interstate or foreign commerce. The common law test of navigability, the rise and fall of the tide, is supplanted by a new test, the test of navigability in fact. On this subject Justice Field made the following classic statement:

> The doctrine of the common law as to the navigability of waters has no application in this country. Here the ebb and flow of the tide do not constitute the usual test, as in England, or any test at all of the navigability of waters. There no waters are navigable in fact, or at least to any considerable extent, which are not subject to the tide, and from this circumstance tide water and navigable water there signify substantially the same thing. But in this country the case is widely different. Some of our rivers are as navigable for many hundreds of miles above as they are below the limits of tide water, and some of them are navigable for great distances by large vessels, which are not even affected by the tide at any point during their entire length. A different test must, therefore, be applied to determine the navigability of our rivers, and that is found in their navigable capacity. Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways of commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water.

On the other hand, Justice Field has held that a river "can only be deemed a navigable water of the United States when it forms, by itself or by its connection with other waters" a "continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water. If, however, the river is not itself a highway for commerce with other states or foreign countries, or does not form such highway by its connection with other waters, and is only navigable between different places within the

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state, then it is not a navigable water of the United States, but only a navigable water of the state."[5]

On the doctrine thus established it was held in The Daniel Ball that a steamer transporting, on a navigable water of the United States as there defined, goods destined for other states, was engaged in interstate commerce; that whenever a commodity has begun to move as an article of trade from one state to another, commerce between the states in that commodity has commenced; and the fact that several different and independent agencies are employed in transporting the commodity, some acting in one state, and others through two or more states, does not affect the character of the transaction, each agency, to the extent to which it acts in such transportation, being subject to the regulations of Congress. Hereon Justice Field said:

> We are unable to draw any clear and distinct line between the authority of Congress to regulate an agency employed in commerce between the states when that agency extends through two or more states, and when it is confined in its action entirely within the limits of a single state. If its authority does not extend to an agency in such commerce, when that agency is confined within the limits of a state, its entire authority over interstate commerce may be defeated.[6]

It has been said that it may be doubted whether any one decision of the Supreme Court has placed so much power within the hands of Congress as the case of The Daniel Ball.[7]

Justice Brown has summed up the law of the constitutional construction of the commerce power, by saying[8] that the adjudications of the Supreme Court with respect to the power of the states over the general subject of commerce are divisible into three classes. First, those in which the power of the state is exclusive; second, those in which the states may act in the absence of legislation by Congress; third, those in which the action of Congress is exclusive and the states cannot interfere at all. The first class,

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[5] The Montello (1870), 11 Wall. 411, 415, 20 L. Ed. 191. In this case the court held that from the information presented they could not affirm that the Fox River, in Wisconsin, formed such a continued highway as to be considered a navigable water of the United States. But in a later case, [The Montello (1874), 20 Wall. 430, 22 L. Ed. 391] it was held that the Fox River was to be brought within the class of streams forming continued highways of commerce, although its navigability was interrupted by rapids and falls around which portages had to be made.

[6] The Daniel Ball (1870), 10 Wall. 557, 566, 19 L. Ed. 999.

[7] Great American Lawyers, 73.

[8] Covington & Cincinnati Bridge Co. v. Kentucky (1894), 154 U. S. 204, 209, 38 L. Ed. 962, 14 Sup. Ct. Rep. 1087.

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including all those wherein the states have plenary power, and Congress has no right to interfere, concerns the strictly internal commerce of the state, and while the regulations of the state may affect interstate commerce indirectly, their bearing upon it is so remote that it cannot be termed in any just sense an interference. In a case to which we have already referred the court held, speaking through Justice Field, that a state might regulate the navigation of the strictly internal waters of the state, such waters, that is, as do not by themselves or by connection with other waters form a continuous highway over which commerce may be carried on with other states or with foreign countries.[9]

In the second class mentioned by Justice Brown, those concerning what may be termed concurrent jurisdiction over commerce, Justice Field rendered a number of decisions. Among the subjects of concurrent jurisdiction is the regulation of pilots. Accordingly, Justice Field upheld a law of California which regulated the pilotage of vessels through the Golden Gate.[10] There was a dissent in this case, which did not, however, impugn the general principle. Justice Miller, who wrote the dissenting opinion, said that the point of difference was whether the act of Congress of 1852 covered the subject-matter of the California statute so as to oust the state of jurisdiction. The majority of the court held that it did not.

In County of Mobile v. Kimball[11] it was held that the improvement of harbors, bays and navigable rivers was within the concurrent power of the states. Justice Field's opinion in Mobile v. Kimball, however, cuts a larger figure than the determination of this mere question, and was destined to play an important role in furnishing a test for the general validity of the state's action. Justice Curtis had, in the case of Cooley v. Port Wardens,[12] formulated a rule, previously suggested by Webster as counsel in Gibbons v. Ogden,[13] and taken up by Justice Woodbury in both the License Cases[14] and the Passenger Cases.[15] Justice Curtis said: "The power to regulate commerce embraces a vast field, containing not only many, but exceedingly various subjects, quite unlike

[9] The Montello (1870), 11 Wall. 411, 20 L. Ed. 191.
[10] Steamship Co. v. Joliffe (1864), 2 Wall. 450, 17 L. Ed. 805.
[11] (1880), 102 U. S. 691, 26 L. Ed. 238.
[12] (1851), 12 How. 298, 13 L. Ed. 996.
[13] (1824), 9 Wheat. 1, 6 L. Ed. 23.
[14] (1847), 5 How. 504, 624, 625, 12 L. Ed. 256.
[15] (1849), 7 How. 283, 559-561, 12 L. Ed. 702.

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in their nature; some imperatively demanding a single uniform rule, operating equally on the commerce of the United States in every port; and some, like the subject now in question, as imperatively demanding that diversity which alone can meet the local necessities of navigation. Either absolutely to affirm or deny that the nature of this power requires exclusive legislation by Congress, is to lose sight of the nature of the subjects of this power, and to assert concerning all of them what is really applicable to a part. Whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress." What had hitherto been a contest concerning the exclusiveness of the federal power over commerce became, after Justice Curtis' statement of the rule, a dispute over the determination whether the power in question was local or national in its nature, requiring or not requiring a rule capable of uniform application. Now, Justice Field's opinion in Mobile v. Kimball sought to furnish a clue to the determination of this question, by declaring that the controlling purpose of the commerce clause in the Constitution was to secure interstate commerce from conflicting or discriminating state regulations, and that the application of Justice Curtis' rule must be made in the light of that purpose. Accordingly, the discriminating or non-discriminating nature of a state statute would afford the test of its constitutionality. If, however, it was meant to imply that that was the only test, the court has taken a different view, saying that the question of discrimination "does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce."[16] Justice Field saw this as quickly as any one, for he said in another case: "What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state. The state possesses the power to prescribe all such regulations with respect to the possession, use and sale of property within its limits as may be necessary to protect the health, lives and morals of its people; and that power may be applied to all kinds of property, even that which in its nature is harmless. But the power of

[16] Per Bradley, J., in Robbins v. Shelby County Taxing District (1886), 120 U. S. 489, 497, 30 L. Ed. 694, 7 Sup. Ct. Rep. 592. In this case Chief Justice Waite wrote a dissenting opinion, in which Justices Field and Gray concurred.

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regulation for that purpose is one thing, and the power to exclude an article from commerce by a declaration that it shall not thenceforth be the subject of use and sale, is another and very different thing. If the state could thus take an article from commerce, its power over interstate commerce would be superior to that of Congress, where the Constitution has vested it."[17] However, the Bowman case, from which we have just quoted, exemplifies not so much the aspect of the commercial power we are now considering as that which falls under the third head, where the power of Congress is exclusive.

In several important cases, in which Justice Field wrote the opinion, the Supreme Court held that a state might make provision for the improvement of navigation in streams by removing obstructions and deepening channels; and, even, for the sake of the general commerce of the state, obstruct the free navigation of the stream by bridges and highways. The general principle underlying such cases is thus expressed:

> The states have full power to regulate within their limits matters of internal police, including in that general designation whatever will promote the peace, comfort, convenience, and prosperity of their people. This power embraces the construction of roads, canals, and bridges, and the establishment of ferries, and it can generally be exercised more wisely by the states than by a distant authority. They are the first to see the importance of such means of internal communication, and are more deeply concerned than others in their wise management. . . . . If the power of the state and that of the federal government come in conflict, the latter must control and the former yield. This necessarily follows from the position given by the Constitution to legislation in pursuance of it, as the supreme law of the land. But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary.[18]

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[17] Bowman v. Chicago & N. W. Ry. (1887), 125 U. S. 465, 501, 31 L. Ed. 700, 8 Sup. Ct. Rep. 689, (concurring opinion).

[18] Escanaba Co. v. Chicago (1882), 107 U. S. 678, 683, 27 L. Ed. 442, 7 Sup. Ct. 185. In this case the City of Chicago had constructed drawbridges across the Illinois River, and the navigation of the stream was interrupted by the closing of the draws, which was regulated in the interest of traffic across the stream as much of that along the stream. The other cases referred to are: Cardwell v. American Bridge Co. (1885), 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. Rep. 423, where the state authorized the construction of a bridge over the American River in California, Hamilton v. Vicksburg, S. & P. R. R. (1886), 119 U. S. 280, 30 L. Ed. 393, 7 Sup. Ct. Rep. 206, where the principle was reiterated and it was held that wherever the exercise of a right, conferred by law for the benefit of the public is

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On the other hand, restrictions upon interstate commerce or upon the free navigation of the navigable waters of the United States cannot be tolerated under the guise of being police regulations. Thus, an ordinance of the city of Chicago, imposing a license tax for the privilege of navigating the Chicago River and its branches upon steam tugs licensed by the United States authorities, was held unconstitutional as conflicting with rightful federal power. Justice Field said:[19]

> The decisions of this court in Huse v. Glover, 119 U. S. 543, and in Sands v. Manistee River Improvement Co., 123 U. S. 288, are particularly referred to and relied upon. The attempt is made to assimilate the present to those cases from the fact that it is conceded that the Chicago River is from time to time deepened for navigation purposes by dredging under the direction and at the expense of the city. The license fee provided for in the ordinance of the city is treated as in the nature of a toll or compensation for the expenses of deepening the river. But the plain answer to this position is that the license fee is not exacted upon any such ground, nor is any suggestion made that any special benefit has arisen or can arise to the tugs in question by the alleged deepening of the river. The license is not exacted as a toll compensation for any specific improvement of the river, of which the steam barges or tugs have the benefit, but is exacted for the keeping, use or letting to hire of any steam tug, or barge or tow-boat, for towing vessels or craft into the Chicago River, its branches or slips connected therewith. The business of the steam barge or tow-boat is to aid the movement of vessels in the river and its branches and adjacent waters; that is, to aid the commerce in which such vessels are engaged.

A series of cases has been decided by the Supreme Court on the question of the validity of state laws seeking to control the manner of running and operating railroad trains. When the provisions of these laws have been found reasonably appropriate to the safety and convenience of the public, and not discriminating against interstate commerce, they have been sustained even

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attended with temporary inconvenience to private parties, in common with the public in general, they are not entitled to damages therefor; Huse v. Glover (1886), 119 U. S. 543, 30 L. Ed. 487, 7 Sup. Ct. Rep. 313; Sands v. Manistee River Improvement Co. (1887), 123 U. S. 288, 31 L. Ed. 149, 8 Sup. Ct. Rep. 113, where it was held that a state might impose a reasonable charge, even on those engaged in interstate transportation, for the use of an improvement in navigation to meet the cost thereof.

[19] Harman v. Chicago (1893), 147 U. S. 396, 408, 37 L. Ed. 216, 13 Sup. Ct. Rep. 306.

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though they incidentally affected interstate trains. One of the earlier of these cases was Nashville, C. & St. L. R. R. v. Alabama,[20] upholding a requirement by the state that railway engineers be examined from time to time with respect to their ability to distinguish colors. Justice Field said:

> It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railway trains engaged in that commerce; and that such legislation will supersede any state action on the subject. But until such legislation is had, it is clearly within the competency of the states to provide against accidents on trains whilst within their limits. Indeed, it is a principle fully recognized by decisions of state and federal courts, that whenever there is any business in which, either from the products created or the instrumentalities used, there is danger to life or property, it is not only within the power of the states, but it is among their plain duties, to make provision against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as is practicable.

In a much later case,[21] in which was declared void an order of a state railroad commission requiring a railway company to stop its interstate trains at a specified county seat, already provided with adequate passenger facilities, the court said:

> We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the State through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the transportation of interstate passengers and freight.

It had been found that during certain seasons of the year cattle brought from Texas and other portions of the South often communicated to Northern cattle a disease known as Texas

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[20] (1888), 128 U. S. 96, 99, 32 L. Ed. 352, 9 Sup. Ct. Rep. 28.

[21] Per Peckham, J., in Mississippi Railroad Comm. v. Illinois Central R. R. (1906), 203 U. S. 335, 346, 51 L. Ed. 209, 27 Sup. Ct. Rep. 90.

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fever, and for that reason a number of states passed laws excluding Southern cattle from their territory during the part of the year when danger was apprehended. A statute of Missouri was in question in the case of Railroad Co. v. Husen,[22] in which an action was brought to recover damages for communication of disease to plaintiff's cattle. The statute forbade the transportation of Southern cattle, not specifying those infected with disease, into Missouri between the 1st of March and the 1st of November of each year, and made carriers transporting them responsible for damages resulting from Texas fever communicated by such cattle. The court held that these restrictions went beyond the danger to be apprehended, and declared the act unconstitutional. The fact remained, however, that cattle brought from the low lands of the South during the warm months were likely to carry Texas fever, and of this fact the court took judicial notice in the case of Kimmish v. Ball.[23] In this case the court, speaking through Justice Field, sustained a law of Iowa, which made persons who permitted Southern cattle to run at large in the state during the warm season liable for resulting damage. The statute in this case, as in the Husen case, excluded all Southern cattle from the state during a large part of the year. The court said no attempt had been made in the Husen case to show that all cattle from the malarial districts of the South were infected, or that so many were infected as to make separation impracticable. Had such proof been given, a different question would have been presented.

The paramount authority over interstate commerce resting in Congress, state laws must not, by way of taxes or other restrictive measures, discriminate against products of other states, against non-resident traders, or against companies doing an interstate commerce business. In attempting to indicate the line of division between state and federal power, Justice Field, in a leading case, [24] spoke as follows:

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[22] (1877), 95 U. S. 465, 24 L. Ed. 527, per Strong, J.

[23] (1889), 129 U. S. 217, 32 L. Ed. 692, Sup. Ct. Rep. 277. Without impugning the decision in Railroad Co. v. Husen, on the facts of that case, the doctrine of Kimmish v. Ball has been sustained by a number of recent cases, as, Missouri, K. & T. Ry. v. Haber (1898), 169 U. S. 613, 42 L. Ed. 878, 18 Sup. Ct. Rep. 488, Rasmussen v. Idaho (1901), 181 U. S. 198, 21 Sup. Ct. Rep. 594; Ried v. Colorado (1902), 187 U. S. 137, 47 L. Ed. 108, 23 Sup. Ct. Rep. 92.

[24] Welton v. Missouri (1876), 91 U. S. 275, 281, 23 L. Ed. 347.

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> There is a difficulty, it is true, in all cases of this character, in drawing the line precisely where the commercial power of Congress ends and the power of the State begins. A similar difficulty was felt by this court, in Brown v. Maryland, in drawing the line of distinction between the restriction upon the power of the states to lay a duty on imports, and their acknowledged power to tax persons and property; but the court observed, that the two, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them; but that, as the distinction exists, it must be marked as the cases arise. And the court, after observing that it might be premature to state any rule as being universal in its application, held, that, when the importer had so acted upon the thing imported that it had become incorporated and mixed up with the mass of property in the country, it had lost its distinctive character as an import, and become subject to the taxing power of the State; but that, while remaining the property of the importer in his warehouse in the original form and package in which it was imported, the tax upon it was plainly a duty on imports prohibited by the Constitution.
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> Following the guarded language of the court in that case, we observe here, as was observed there, that it would be premature to state any rule which would be universal in its application to determine when the commercial power of the Federal Government over a commodity has ceased, and the power of the State has commenced. It is sufficient to hold now that the commercial power continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character.

In the Welton case a state statute was held invalid which prohibited dealing without a license, by going from place to place to sell the same, if any of specified articles not the growth, produce or manufacture of the state, no such license being required as to articles grown, produced or manufactured in the state. In Tiernan v. Rinker,[25] a person, who was pursuing in Texas the occupation of selling wines and beer, filed his petition setting forth that the goods which he sold were the manufacture,

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[25] (1880), 102 U. S. 123, 26 L. Ed. 103. In Downham v. Alexandria (1870), 10 Wall. 173, 19 L. Ed. 929, a municipal ordinance imposed a license on dealers in beer or ale by the cask when not manufactured in the city. It was held, Justice Field writing the opinion of the court, that where it is not shown that the beer and ale in which the plaintiffs deal was manufactured either in a foreign country or in another state, there is no violation of the commerce clause.

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not of Texas, but of other states and of foreign nations, and praying that the county treasurer be enjoined from collecting the tax imposed by an act of 1873, on the ground of its repugnance to the Constitution of the United States. Speaking through Justice Field, the court affirmed the doctrine of the Welton case, but held that as the plaintiff was also engaged in selling other liquors, the injunction should be refused.

Again in Webber v. Virginia,[26] a statute was held invalid which required a license to be taken out by any person who should sell the manufactured articles or machines of other states, unless he were the owner and taxed as a merchant. Justice Field said: "If, by reason of their foreign character, the state can impose a tax upon them or upon the person through whom the sales are effected, the amount of the tax will be a matter resting in her discretion. She may place the tax at so high a figure as to exclude the introduction of the foreign article and prevent competition with the home product. It was against legislation of this discriminating kind that the framers of the Constitution intended to guard when they vested in Congress the power to regulate commerce among the several states."

It has come to be an accepted doctrine that the business of all transportation companies may be regarded as a single homogeneous unit, and their property, wherever situated, so long as used for the business of transportation, may also be considered as a unit for the purpose of taxation. The leading case setting forth this doctrine, and the first case before the Supreme Court involving taxation of an interstate railroad as such, was the case of the Delaware Railroad Tax.[27] In this case the tax was in form laid upon the capital stock of the railroad in proportion to the mileage within the state. It was shown that the value of the property within the state was less than the mathematical proportion based upon the mileage of the railroad within and without the state. It was accordingly claimed that this was an attempted taxation of property beyond the jurisdiction of the state, and that there was no relation between the capital invested and the number of shares of the company owned in the state. Justice Field, speaking for the court, replied that the tax was not upon the shares, nor upon the property of the corporation, but a tax upon

[26] (1880), 103 U. S. 344, 350, 26 L. Ed. 565.
[27] (1874), 18 Wall. 206, 21 L. Ed. 888.

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the corporation, measured by a percentage upon the cash value of a certain proportional part of the shares, and that, although the rule was arbitrary, it was approximately just, and within the power of the legislature to adopt. He said: "The state may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion."

The case of Gloucester Ferry Co. v. Pennsylvania[28] did not modify the rule of the Delaware Railroad Tax, when it announced unequivocally that interstate commerce could not be taxed at all. Here the tax which the court refused to sustain was upon the entire capital stock of a foreign corporation on account of its property within the state. The land which the ferry company owned in Pennsylvania could of course be taxed, but the business of ferriage between states was wholly beyond the jurisdiction of Pennsylvania. Justice Field remarked: "However great her power, no legislation on her part can impose a tax on that portion of interstate commerce which is involved in the transportation of persons and freight, whatever be the instrumentality by which it is carried on."

The rule of the Delaware Railroad Tax Case, while sustained in subsequent cases, has also been greatly extended. In the State Railroad Tax Cases,[29] and the Kentucky Railroad Tax Cases,[30] the value of the road in question was ascertained by adding together the cash value of the bonds and stock of the company. In all these cases the tax was upon corporations of the state's own creation, and the method of appraisement was not considered open to objection. In two other railroad cases,[31] the mileage rule of taxation was again approved. Justice Brewer, for the court, said: "It is ordinarily true that when a railroad consists of a single continuous line, the value of one part is fairly estimated by taking that part of the value of the entire road which is measured

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[28] (1885), 114 U. S. 196, 29 L. Ed. 158, 5 Sup. Ct. Rep. 826.
[29] (1876), 92 U. S. 575, 23 L. Ed. 663.
[30] (1885), 115 U. S. 321, 29 L. Ed. 414, 6 Sup. Ct. Rep. 57.
[31] Pittsburgh, C., C. & St. L. Ry. v. Backus (1894), 154 U. S. 421, 430, 38 L. Ed. 1031, 14 Sup. Ct. Rep. 1114; Cleveland, C., C. & St. L. Ry. v. Backus (1894), 154 U. S. 439, 38 L. Ed. 1041, 14 Sup. Ct. Rep. 1122. In these cases Justice Harlan gave a dissenting opinion, in which Justice Brown concurred.

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by the proportion of the length of the particular part to that of the whole road. This mode of division has been recognized by this court several times as eminently fair."

In two successive cases from Massachusetts and one from Indiana,[82] the Supreme Court sustained the taxation of the Western Union Telegraph Company under the mileage rule of apportionment, that is, by taking as a basis of assessment such portion of the capital stock of the company as equaled the ratio of the company's mileage within the state to its total mileage. And so, as to railroad, telegraph and sleeping-car companies, the rule, as stated in a later case,[83] is "that their property in the several states through which their lines of business extends may be valued as a unit for the purpose of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular state, without violating any federal restriction. [Citing the telegraph cases just reviewed]. The valuation was, thus, not confined to the wires, poles and instruments of the telegraph company; or the roadbed, ties, rails and spikes of the railroad company; or the cars of the sleeping-car company; but included the proportionate part of the value resulting from the combination of the means by which the business was carried on, a value existing to an appreciable extent throughout the entire domain of operation. And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular state is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole (Pittsburgh, etc. Railway v. Backus, 154 U. S. 421); or taking as the basis of assessment such proportion of the capital stock of a sleeping-car company as the number of miles of railroad over which its cars are run in a particular state bears to the whole number of miles traversed by them in that and other states (Pullman's Palace

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[82] Western Union Tel. Co. v. Massachusetts (1888), 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961; Massachusetts v. Western Union Tel. Co. (1891), 141 U. S. 40, 35 L. Ed. 628, 11 Sup. Ct. Rep. 889; (Field and Harlan, JJ., dissented in this case, but without writing an opinion); Western Union Tel. Co. v. Taggart (1896), 163 U. S. 1, 41 L. Ed. 49, 16 Sup. Ct. Rep. 1054.

[83] Adams Express Co. v. Ohio State Auditor (1897), 165 U. S. 194, 220, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305.

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Car Co. v. Pennsylvania, 141 U. S. 18); or such a proportion of the whole value of the capital stock of a telegraph company as the length of its lines within a state bears to the length of all its lines everywhere, deducting a sum equal to the value of its real estate and machinery subject to local taxation within the state (Western Union Tel. Co. v. Taggart, 163 U. S)."

The next extension of the doctrine was to express companies. On the face of it, at least, the step forward was considerable, for the actual tangible property of the express company within the state was relatively small, whereas the value of the entire concern measured by the amount of business done was very great. In the case applying the unit principle of valuation to express companies,[34] the court said: "Doubtless there is a distinction between the property of railroad and telegraph companies and that of express companies. The physical unity existing in the former is lacking in the latter; but there is the same unity in the use of the entire property for the specific purpose, and there are the same elements of value arising from such use. A strong dissent was made by Justices White, Field, Harlan and Brown. The opinion filed by Justice White on behalf of those dissenting insisted that there was no power in the state to tax property outside of its jurisdiction, which in effect it had done in this case under the theory of a homogeneous unit; and that the mere fact that the same owner has property in different states which contribute to his earnings does not create such a unity for the purposes of taxation as to make the property located in one state taxable in another. It was asked, why could not the same rule be applied to a corporation or partnership engaged in the dry goods business, or any other business having branches in different states, on the theory that there was a unity of earnings between the agencies in all the establishments. This would warrant any state, in which one of the branches was established, in taxing the whole on the theory of unity.[35]

The taxation of the receipts of a corporation engaged in interstate business has occassioned not a little difficulty. The State Freight Tax Case,[36] held that a state tax directly upon and measured by the amount of freight carried was, as to interstate

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[34] Adams Express Co. v. Ohio State Auditor (1897), 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305.
[35] Judson on Taxation, 284n.
[36] (1872), 15 Wall. 232, 21 L. Ed. 146.

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freight, a tax on interstate commerce and as such void. But in State Tax on Railway Gross Receipts,[37] a tax on the gross receipts of railways, including receipts from interstate commerce, was upheld, the amount of such receipts being assessed in proportion to the mileage in the state. The authority of this case was shaken in Fargo v. Michigan,[38] and was expressly disapproved in Philadelphia & Southern Mail Steamship Co. v. Pennsylvania.[39] Then came the case of Maine v. Grand Trunk Ry.,[40] in which the opinion was written by Justice Field, and was concurred in by Chief Justice Fuller and by Justices Gray, Blatchford and Brewer. Four judges dissented, Justices Bradley, Harlan, Lamar and Brown. The dissenting opinion was written by Justice Bradley, being his last reported opinion. The statute of Maine required that every corporation, person or association operating a railroad in the state should pay an annual excise tax for the privilege of exercising its franchise in the state. The amount of the tax was to be ascertained as follows: the gross receipts were to be divided by the number of miles of road operated, and the resulting average, multiplied by the number of miles operated within the state, was to be the basis of the taxation. The tax was sustained on the ground that it was an excise tax for the privilege of exercising its franchises within the state of Maine; that it might be enacted, since the state had the right to exclude the corporation, if a foreign one, or refuse it a franchise, if a domestic one; and, further, that it was not a regulation of commerce because it was not a direct tax on the receipts. The minority could not regard it otherwise than as a tax on gross receipts, for interstate as well as intrastate business, and, therefore, as in conflict with the decisions which we have reviewed above.

While the case of Maine v. Grand Trunk Ry. has been approved, it has also met with adverse criticism.[41] Professor Beale,[42] says

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[37] (1872), 15 Wall. 284, 21 L. Ed. 164.

[38] (1887), 121 U. S. 230, 30 L. Ed. 888, 7 Sup. Ct. Rep. 857.

[39] (1887), 122 U. S. 326, 30 L. Ed. 1200, 7 Sup. Ct. Rep. 1118. This case was in turn followed by Ratterman v. Western Union Tel. Co. (1888), 127 U. S. 411, 32 L. Ed. 229, 8 Sup. Ct. Rep. 1127, in which it was attempted to tax the gross receipts of an interstate telegraph company; and it has been approved later: Norfolk & Western R. v. Pennsylvania (1890), 136 U. S. 114, 34 L. Ed. 394, 10 Sup. Ct. Rep. 958.

[40] (1891), 142 U. S. 217, 35 L. Ed. 994, 12 Sup. Ct. Rep. 121.

[41] Cooke, Commerce Clause of the Federal Constitution, 149.

[42] Beale, The Taxation of Foreign Corporations, 17 Harvard Law Review, 248, 262.

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that the ground seemingly taken by the majority, that the tax might be supported as an excise tax for the privilege of coming into the state, is certainly unsound; for later as well as earlier cases agree that a state cannot exclude from its territory a corporation or an individual engaged in interstate commerce or in the service of the national government. Justice Field, of course, recognized this, for he himself said: "Only two exceptions or qualifications have been attached to it [exclusion of foreign corporations] in all the numerous adjudications in which the subject has been considered, since the judgment of this court was announced more than half a century ago in Bank of Augusta v. Earle, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U. S. 12. The other limitation of the power of the state is, where the corporation is in the employ of the general government, an obvious exception, first stated, we think, by the late Mr. Justice Bradley, in Stockton v. Baltimore & New York Railroad, 32 Fed. 9, 14."[43] Professor Beale suggests that some more tenable ground must be found, which he thinks may be in that rule, which we have already discussed, where a tax had been laid, as upon telegraph companies, for the privilege of carrying on their business, graduated upon the amount of property in miles and its value, and exempting them from all other taxation. Such a mileage basis for apportioning a tax is well established, as we have seen. The authority of the case of Maine v. Grand Trunk Ry. has been sustained by the Supreme Court, and the meaning of its holding explained, as may be seen from the following extract of an opinion by Mr. Justice Holmes:[44]

> The lines of railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by Philadelphia & Southern Mail Steamship Co. v. Pennsylvania, 122 U. S. 326. The counsel for the

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[43] Horn Silver Mining Co. v. New York (1892), 143 U. S. 305, 314, 36 L. Ed. 164, 12 Sup. Ct. Rep. 403.

[44] Galveston, H. & S. A. Ry. v. Texas (1908), 210 U. S. 217, 224, 52 L. Ed. 1031, 28 Sup. Ct. Rep. 638.

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state rely upon Maine v. Grand Trunk Ry. Co., 142 U. S. 217, and maintain, if necessary, that the latter overrules the earlier case.

In Philadelphia & Southern Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. . . . . In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, the authority of the Philadelphia Steamship Company Case was accepted without question, and the decision was justified by the majority as not in any way qualifying or impairing it. The validity of the distinction was what divided the court. . . . .

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least in the long run, come out of income, obviously taxes called taxes on property and those called taxes on income or receipts tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & Michigan Ry. Co. v. Powers, 191 U. S. 379, the measure of property by income purported only to be prima facie valid. But the extreme case came earlier. In Maine v. Grand Trunk Ry. Co., 142 U. S. 217, "an unnual excise tax for the privilege of exercising its franchise," was levied upon every one operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state when the road extended outside. This seems at first sight a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have been made a measure of the value of the property per mile. That the effort of the state was to reach that value and not to fasten on the receipts from transportation as such was shown by the fact that the scheme of the state was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together may be called a commutation tax.

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The authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is supreme, whenever Congress chooses to exercise its power; and the states can impose no impediment thereto. An Indiana statute required that a telegraphic message must be delivered to the person addressed if residing within a certain distance of the receiving office. After reviewing the two cases[45] in which the Supreme Court had already considered the respective powers of Congress and the states over intercourse by the telegraph, Justice Field,[46] in holding the Indiana statute void in requiring the delivery of a message to a person addressed in another state, said:

> In these cases the supreme authority of Congress over the subject of commerce by the telegraph with foreign countries or among the states is affirmed, whenever that body chooses to exert its power; and it is also held that the states can impose no impediments to the freedom of that commerce. In conformity with these views the attempted regulation by Indiana of the mode in which messages sent by telegraphic companies doing business within her limits shall be delivered in other states cannot be upheld. It is an impediment to the freedom of that form of interstate commerce, which is as much beyond the power of Indiana to interpose, as the imposition of a tax by the state of Texas upon every message transmitted by a telegraph company within her limits to other states was beyond her power.

In a later case,[47] however, a statute of Georgia imposing liability on a telegraph company for failure to transmit and deliver with due diligence, was upheld, as to a despatch from a point without to a point within the state. Justice Peckham said: "While it is vitally important that commerce between the states should be unembarrassed by vexatious state regulations regarding it, yet on the other hand there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those who are engaged in interstate commerce. We think the statute in question is one of that class, and in the

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[45] Pensacola Tel. Co. v. Western Union Tel. Co. (1878), 96 U. S. 1, 24 L. Ed. 708; Telegraph Co. v. Texas (1882), 105 U. S. 460, 26 L. Ed. 1067.

[46] Western Union Tel. Co. v. Pendleton (1887), 122 U. S. 347, 30 L. Ed. 1187, 7 Sup. Ct. Rep. 1126.

[47] Western Union Tel. Co. v. James (1896), 162 U. S. 650, 40 L. Ed. 1105, 16 Sup. Ct. Rep. 934.

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absence of any legislation by Congress the statute is a valid exercise of the power of the state over the subject. Justices Shiras and White dissented on the ground that the decision was in conflict with Western Union Tel. Co. v. Pendleton. There is certainly a distinction between regulating the delivery of a telegram within a state and regulating the delivery of a telegram without the state; but it is still a question whether the former as well as the latter is not an interference with interstate commerce.[48]

Jusice Field's dissenting opinion in the case of O'Neil v. Vermont[49] should be noted. O'Neil was convicted of selling liquor in Vermont contrary to statute. He was a wholesale and retail dealer in wines and liquors at Whitehall, N. Y. He received orders by mail from persons residing in Rutland, Vt. In reply to such orders, liquors were sent C. O. D. to the purchasers in Vermont. The majority of the court held that no question of interference with the commerce clause had been taken in the state court, and that no federal question was presented and that the Supreme Court had no jurisdiction. Justice Field, in a characteristic opinion, dissented on several grounds. On the question of interference with the commerce clause, he spoke as follows:

> I assume for this case as correct the position of the majority of this court and of the supreme court of Vermont, that the sales were only initiated in New York, and were there merely executory contracts, and were not consummated until delivery of the goods to the purchaser in Vermont. As such they were transactions of interstate commerce which the latter state could not prevent, and for which she could not impose any penalty upon the defendant, though she might place such restrictions upon the disposition of the liquor, as the safety and health of the community might require, after it was brought within her limits, and had become part of the general property there. Against the proceedings resulting in the penalty inflicted, the defendant invoked—and in my judgment was entitled to receive—protection under the clause of the Constitution of the United States vesting in Congress the exclusive power to regulate commerce among the states. The refusal of the state court to afford the protection is sufficient ground for this court to take jurisdiction to review the judgment of that court, and I dissent from my associates in their declining to take such jurisdiction.

A state may tax all property within its jurisdiction. The

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[48] Cooke, Commerce Clause of the Federal Constitution, 242.
[49] (1892), 144 U. S. 323, 342, 36 L. Ed. 450, 12 Sup. Ct. Rep. 693.

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power to regulate interstate commerce is granted to Congress in terms as absolute as is the power to regulate foreign commerce. No state can lay any restrictions upon interstate transportation. When goods are held in a state for any other purpose than for transportation, the transit has ceased, and the goods are subject to state taxation. The adjustment of these several principles in concrete cases has given some difficulty. In Brown v. Houston[50] it was held that coal from another state, unsold, and for sale upon the barges upon which it had been brought, was taxable by the state. Later the emphasis came to be placed upon the absolute freedom of interstate commerce,[51] and the court was urged to overrule Brown v. Houston on the ground that it had been discredited by the later cases. The subject was brought to a head in Pittsburg & Southern Coal Co. v. Bates,[52] where coal, which had been brought down the river from Pittsburgh, was afloat at Baton Rouge in the original barges in which it had been shipped from Pennsylvania. The decision in Brown v. Houston was reaffirmed, Justice Field saying: "The coal in this case, as in that, still belongs to the original owners in Pennsylvania, but is brought on the navigable waters of the United States in boats and barges to Louisiana for purposes of sale, and is subject to taxation and sale as any other property of the citizens of the United States is subject when it becomes incorporated into the bulk of the property of the country, unless there be some special exemption set forth why it should not be thus taxed and sold, of which there is none here."

William Carey Jones.

Berkeley, California.

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[50] (1885), 114 U. S. 622, 29 L. Ed. 257, 5 Sup, Ct. Rep. 1091.

[51] Bowman v. Chicago & N. W. Ry. (1888), 125 U. S. 465, 31 L. Ed. 700, 8 Sup Ct. Rep. 689; Leisy v. Hardin (1890), 135 U. S. 100, 34 L. Ed. 128, 10 Sup. Ct. Rep. 681.

[52] (1895), 156 U. S. 577, 39 L. Ed. 538, 15 Sup. Ct. Rep. 459.

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Legislative Failure and Reform

ONE of the most disturbing phenomena to the student of government is the modern decay of the power and reputation of legislatures. The evidence of decline is wide-spread. It is true of the British House of Commons no less than of the American Congress, of the French Chamber of Deputies as of American state legislatures. The general complaint is that the quality of representatives chosen has lowered, that purely local interests determine the votes of members, and that executive power has everywhere grown at the expense of the legislature.

In American state government the diminution of legislative power has been going on for many years. It began with the imposition of constitutional restraints upon the legislature's action, and particularly with the prohibition against special laws. Drafters and amenders of state constitutions have proceeded further and further in creating new limitations, until now the typical American state legislature finds its freedom curtailed in a great variety of ways. As field after field of legislation passes, by constitutional restriction, beyond the jurisdiction of the legislature, the necessity arises of securing reform or added legislation in these fields by further amendment of the constitution and results in the writing into the organic law of the state of what are, in effect, merely statutes. The Constitution of California in its present form contains the entire law governing the initiation of legislation, amounting to over two thousand five hundred words;[1] the law for the framing of freeholders' charters in counties, three thousand words;[2] the law for the framing of freeholders' city charters, two thousand five hundred words;[3] the law organizing and defining the powers of the State Railroad Commission, one thousand eight hundred words.[4] Such laws are placed beyond the competence of the legislature to amend, and every necessary modification can only be accomplished by further constitutional amendments. Such a sit-

[1] Art. IV, § 1.
[2] Art. XI, § 7½.
[3] Art. XI, § 28.
[4] Art. XI, §§ 22, 23.

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uation defeats the very purpose of an organic law and destroys the distinction between constitutional law and statute law.[5]

The adoption by many states of the initiative and the referendum still further reduces the position of the legislature, and has even created the assumption in many minds that representative legislative bodies are superfluous. The adoption of a referendum provision as a safeguard against injudicious or unpopular legislation would logically call for the removal of constitutional prohibitions on the legislature formerly imposed for the same end, but so far as I know, no movement in this direction has begun.

But the most striking exhibition of legislative decline, both in the nation and in the American states, is seen in its subordination to the chief executive. The old "doctrine of separation of powers," like so many other political formulas to which the American mind tenaciously holds, is completely fictitious when tested by the realities of our government. The executive no longer simply administers; he is held responsible by state and nation for the legislation enacted during his administration. It is not merely a matter of his use of the veto; it is rather a question of his power of initiation and direction of legislation, and both at Washington and at our state capitols the really significant projects of law are embodied in what we call "administration measures," which originate with the executive and have his active support and solicitude. Mr. Taft, at the commencement of his administration, attempted to stand upon the old theory that presidential dictation to Congress is an unwarranted interference with congressional independence, but his attitude, which was quite correct theoretically, greatly irritated the nation, and established his reputation as a weak executive. On the other hand, the great achievements by the governors of many states in the last fifteen years, from Governor Hughes of New York to Governor Johnson of California, have been due to the leadership of these men in the legislature and their capacity to secure the enactment of necessary reforms into law.

There is little doubt that all of these changes, the limitation of legislative power by constitutional amendment, the adoption of the initiative and referendum, the growth of gubernatorial domination represent real accomplishments in the process of our political development, and that they have transformed our state governments decidedly for the better. They have all developed in response to a

[5] Some Tendencies in Constitution Making, 2 California Law Review, 203.

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determination of the people to protect the public interest against private rapacity, and they are coincident with a most encouraging development of state activities. Nevertheless their result has been to reduce the quality and character of our state legislatures and to disturb confidence in the doctrine of representative government. That doctrine, as expounded for example in the classic pages of Walter Bagehot or John Stuart Mill, is one of the noblest expressions of political judgment. It rests upon the faith that voters are capable of choosing as their representatives men somewhat above the level of their own class in sagacity and public spirit, and that while popular judgment may err as respects measures, in the long run, it is correct as to men; that men elected to the position of lawmakers act under an increased sense of public responsibility, that discussion, the meeting of opposing points of view, is vital to the law-making process; that a proper recognition of the interests of all classes of the community is only gained by conference in a body representative of all these classes.

The earlier theory current in the time of our revolutionary framers of government held further that the legislature would be an effective and wholesome restraint against the dangers of executive power. In countries with "parliamentary" or "ministerial" government, where the executive is in effect a committee of the legislature, executive responsibility is theoretically secured by the constant necessity of rendering account to the legislative body of all matters, both of administration and politics; but the American system of "presidential" government separates the executive from the legislature and makes the executive irresponsible except to the people at periodical elections. Only in certain specific matters, as for example the use of pardoning power, do our state constitutions require the governor to give a report to the legislature of his performance, and in these cases there is no reversal of his action.

The up-shot of the matter is that while the moral character of the men who make up our legislatures has improved in the last fifteen years, so that these bodies are no longer dominated either by politicians of the old stripe, or by mere creatures of "big business" and "bad business," our most representative citizens are coming to feel that the office of legislator is devoid of opportunity and dignity. The legislature which assembles in Sacramento as this article goes to press will contain a disappointingly low proportion of men who have had the advantage of previous experience in that body.

It is undeniable that much of the decline in public esteem and

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of the failure of state legislatures to do their tasks effectively rests upon themselves. Yet one of the most serious defects of a legislator's position is beyond his control, and results from the vicious American theory that the members of legislative bodies must in all cases be actual residents of the districts they represent. This is one of those numerous points where a people who pride themselves upon their practical sense have bound themselves rigidly to an unwholesome theory. No legislative body so far as I know outside of America, and American dependencies like the Philippines, where the same unfortunate notion has been engrafted, thus destroys the freedom of the legislator. The effect is not only to render it impossible for the people freely to choose the best and most representative individuals to be found in the state, but binds the political career of a man in a legislature to the prejudices of a majority of his immediate constituents. A member of the legislature who finds himself conscientiously at variance with the wishes of the majority of the people who have elected him, has three courses open; he may yield his own judgment and conscience to theirs, abandon political life, or change his home. The first alternative is the one almost invariably chosen with the result that a member subordinates what he may know to be the interests of the state to the local interests of the district that chooses him. He sacrifices the esteem and confidence of the people of the state as a whole in order that he may retain the political support of the voters of his own district. This situation with all the unfortunate results that have grown out of it, lies at the root of the lack of public confidence in members of legislatures and at the bottom of the general confidence felt in a state governor. For he alone of all the men participating in the enactment of law can afford to ignore the petty interests of certain localities and can fairly claim to put the interests of the state as a whole above those of any locality. This position as the exponent and representative of "all the people" is the real explanation of the source of presidential and gubernatorial power, and of the relative weakness of Congress and the state legislatures.

But legislatures themselves are wholly responsible for their failure to control the volume of projects of law and to limit the exercise of their august power to matters deserving statutory enactment. Nothing has gone further to destroy the position of state legislatures than the ridiculous profusion with which they have

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permitted the unrestricted introduction and passage of bills. The California legislature of 1911 saw introduced into the Assembly 1588 bills and into the Senate 1290, a total of 2878 projects of law. Of this number of bills 753 actually became laws or amendments to the Codes. This was considered to be an unprecedented and amazing license of the legislative power, but it was exceeded by the performance of the legislature of 1915, which saw introduced a total of 3061[5a] bills, constitutional amendments and resolutions, over a thousand of which passed the legislature and 771 of which became laws.[6] Such practice as this defeats the very purpose of legislative bodies and encourages the dangerous inference that legislation may be an individual or personal function. It produces a demoralization of the legislative session in which anything is possible, and frames a spectacle which destroys confidence. It justifies Mr. Roosevelt's condemnation expressed in the Outlook in 1913 that "state legislatures simply spawn bills by the gross like female shad." Legislatures must take steps to completely reform their procedure as the first step to do their task well and to regain public regard. Classical historians inform us that in the Greek state of Locri there was a rule that whoever proposed a new law should do so with a rope around his neck, and if his proposal was rejected he should be strangled on the spot. This summary provision of the Locrian constitution may at least serve to warn our legislatures that the law

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[5a] Joint Final Calendar of Legislative Business, Cal. Legislature, 1915.

[6] "Our legislatures are for the most part limited to short sessions and the terms of the members of the House do not as a rule cover more than one session. Generally, an overwhelming majority of the House of Representatives are first-termers, and without legislative experience. The same thing is often true of the Senate.

"And yet, legislatures so composed, add something like 25,000 pages to our statute books each year. In Massachusetts this year not less than 2,500 bills were introduced. In Pennsylvania, 2,100; in Wisconsin, 1,200; and in the State of Washington, 1,200.

"In 1911 the Session Laws of California was a book of 2,000 printed pages; the Sessions Laws of Connecticut, 360 pages; Idaho, 810 pages; Indiana, 705 pages; Maine, 829 pages; Massachusetts 1,100 pages; Michigan, 533 pages; Missouri, 451 pages; New Jersey, 834 pages.

"The Session Laws of Kansas for 1913 is a book of 594 pages and contains 376 laws and resolutions. Excluding appropriation bills, 36 important new laws were passed. The rest were either local acts, amendments, or were trivial in their nature. The last Kansas legislature was in session 49 days or parts of days, consequently something like 7 laws passed both Houses each day.

"It is hardly possible for a member to read 7 enactments a day, and it is an impossibility for him to comprehend and understand them."

—Governor George H. Hodges of Kansas, in address at Colorado Springs before the Conference of Governors in 1913.

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proposing and enacting power must make its sanctity respected or the legislature itself will be imperiled.

The legislatures not only defeat their purpose by multiplicity of bills, but they render good legislation impossible by the voluminous character of the statutes themselves. Every consideration recommends that a law should be concise, brief and exact. The great legislative enactments from Roman times down are no less marvelous for their conciseness than for their accuracy. No bill is in shape for enactment until it has been hammered into the smallest possible compass. Nothing should appear in a law that is not an essential to its interpretation and enforcement. This is a commonplace of political science and yet some of our laws defy mastery or comprehension by their very length. The last ballot law enacted by the state legislature, which should be understood by every voter and must be understood by every polling officiai, contained over thirty-six thousand words.

In continental jurisprudence a clear distinction is drawn between a "law" (*loi*) which embodies the essential purpose and policy and which is a parliamentary enactment, and subordinate measures designed simply to carry out the provisions of the law and which may require modification from time to time. These "ordinances" (*decréts* and *arrêtés*) in France or European governments generally are the work of the executive, duly authorized to perform this function. There is a certain limited development of the ordinance power in our federal and state governments. Congress frequently entrusts such power to the president, and state boards such as the Civil Service Board or the Board of Health are authorized to frame regulations having the force of laws. If our statutes are to enjoy any permanency and escape that constant tinkering which destroys their sanctity, our legislatures must find means generally to relieve themselves of burdensome, trivial and minor details. Only so may our statute law be reduced to scientific and comprehensible proportions.

The most radical proposal for the reconstitution of state legislatures is to adopt for state government the "commission form," concentrating both the executive and legislative powers of the state in a small commission after the manner of government in certain American cities. In discussing this proposition we do not need to consider the defects of commission organization for administrative work, although these defects are real and apparent, for

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we are not concerned with the operation of commission government as an executive. The objection to commission government on its legislative side, which is all we have here to consider, is, that a commission is too small a body to fulfill the demands of representative government. This is even true of the commission government of large cities. Five men chosen at large do not form a representative legislative or policy-deciding body for a city of a quarter of a million or even of a hundred thousand souls, and no such body could pretend to represent the varied interests of a state. The proposition to concentrate the legislative power in a commission is akin to that to make of the legislature a body of experts. There is a large place and a great need for the expert in legislation, but his proper place is in the initial drafting and shaping of laws, not in their final enactment. The final enactment of laws in a democracy is essentially a popular act, and under representative government is discharged by representatives from all classes of the people. Legislation by experts might for a while give us carefully framed and in a measure judicious laws, but we would not have representtative government.

To entrust the legislative power to a small body of experts is to entirely disregard the historic character of parliaments, which have always contained bodies of laymen chosen from one or several classes of the people with the power to sit in legislative judgment upon the achievements and performance of the government, to vote the necessary grants of funds and impose taxation, and finally to settle the large questions of policy and give validity to laws. I hold strongly to the view that in a democracy a legislature must contain men chosen by all elements of society and capable of interpreting their needs and reflecting their views. In a democracy disfranchisement of any class, even on grounds of illiteracy or dependence, is a dangerous expedient, because it creates a class of people outside the state and prepares a ground for attacks upon the state itself.

I feel that proposals for commission legislatures or for legislatures of experts arise from a confusion between those two broad branches of government which have been defined by Professor Goodnow as "politics" and "administration." Politics embraces legislation, the determination of public policies, the voting of funds and the imposition of taxation. This, in a representative government, is the function of the nation through its representatives, and must of necessity be sanctioned by laymen. In its last

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analysis it is indisputably a lay responsibility. Administration has to do withe the carrying into effect of the policies decided by politics, the conduct of the state's business, the operation of its executive machinery. It may be entirely divorced from politics and from all partisan and political issues. Every considera-ation recommends that this side of government be entrusted to the best qualified. Here is the expert's place and here in the best government he is considered indispensable. In other words, while politics and political power in a state, organized according to American ideals, should be based upon the most democratic principles, administration, in America no less than anywhere else in the world, should be as aristocratic as possible, using the term aristocratic not in the sense of having reference to any privileged class but in the highest use of the word,—administration by the best qualified. I would reject absolutely then, as undemocratic and unrepresentative, all proposals for a commission legislature or an expert body of legislators, and in constituting a legislature I would hold to the simple principles that it must be large enough to satisfactorily represent all parts of the state and if possible all respectable elements of society. A district entitled to representation should not be so large that a man standing there for election could not become acquainted with all its communities and be known by sight and voice to its inhabitants. Personal impression is indispensable to the proper choice of a representative to a legislative body.

There is much less, however, that can be said in objection to the proposition now current in many states to reduce the state legislature to a single chamber. The bicameral system finds its most useful application in states with a federal system where it is desirable to constitute one house upon the basis of population and the upper house, or senate, for the representation of the members themselves of the federation. This device which was an American discovery and made possible the formation of our Union, has been repeatedly imitated, and the American senate finds its counterpart in the upper house of the German Empire, the Dominion of Canada, the Australian Commonwealth, the Union of South Africa, and Mexico and the Argentine. In other governments the upper house is usually a conservative body perpetuating the power of certain privileged classes, or, resting upon a higher requirement of age or property qualification, is designed to act as a restraint upon the more popular branch of the legislature. But in the states of the American union there is little to justify the bicameral legis-

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lature except the argument that it furnishes a double consideration of legislative proposals. We owe the existence of our state senates to the fact that in the colonial legislatures before the Revolution the governors generally had advisory councils which assisted them in executive responsibilities and advised upon the exercise of the veto, and these councils became in the early state constitutions upper legislative houses, in four cases chosen by the lower house itself as the city aldermen were chosen by the municipal council of an English borough; while seven states, anticipating the federal constitution, gave to their upper houses the name of "senate." Pennsylvania alone of the thirteen original states contented herself in the beginning with a single chamber. The immense influence of the federal pattern of government imposed itself, however, from the start upon state constitutions and bicameral state legislatures have prevailed, and for a century there has been no exception among the states of the American union.

In the federal countries to the north and the south of us, however, the single chamber legislature is general. Under the federal constitution of Mexico, first adopted in 1823, each state (of which there are now twenty-seven) has its own legislature, and these legislatures consist of a single chamber. In the early history of Mexican state government an upper chamber or senate was frequently considered, but its creation generally postponed in the interests of economy. In the course of years, however, the unicameral system has thoroughly established itself and everywhere prevails. In spite of the faulty working of the Mexican constitutional system, there is much that the student of political science may learn from the conduct of Mexican state government. These state legislatures, or *congresos,* are small, usually consisting of from only nine to fifteen members. The deputies are selected by districts and for terms that vary from one to four years. An alternate (*suplente*) is elected at the same time with the deputy and takes his place in case of death, retirement or absence. While the size and population of a Mexican state make bodies so small as the Mexican legislatures are, more nearly representative than would be the case in the American union, nevertheless the disadvantages of their small size are apparent. A body of nine to fifteen members is more easily controlled or dominated by executive authority than a legislature of greater numbers. It lacks the courage of a larger and more representative assembly. Its deliberations do not take on the character of public debate and its work tends to be dispatched in the manner

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of a committee. While these and other arguments could be advanced for enlarging the membership of these legislatures, I doubt if any opinion in Mexico or among Mexican students of their government would champion the plan of two chambers.

The provinces of the Dominion of Canada have likewise tended toward a single chamber system. Two of them, Quebec and Nova Scotia, still retain an upper house. The others, either by change of their original institutions or, on their first adoption of provincial constitutions, have settled upon the unicameral system.[7] Canadians generally seem to have decided that the single-chamber provincial legislature is not only more economical but more responsible and altogether more satisfactory than a bicameral legislature. It must be said, however, in regard to their law-making process, that as is usual under the parliamentary system of government, most legislation is introduced by the ministry, and in this manner careful preliminary study of bills and a double deliberation in council of ministers and in parliament is secured.

As against the theory of the check of one house upon the other, the advocate of single chambers argues that this is not an unmixed advantage, as it frequently disposes one chamber to avoid responsibility or the tedium of close investigation by passing doubtful or ill-considered measures on to the other branch of the legislature, whereas in the closing days of the session the action of two houses seldom secures the careful consideration of any but the most important measures.

There is less to recommend the dual organization of state legislatures because of the fact that in American state government there has been little or no specialization of function between them. The natural division would be to accord to the lower house the origination of appropriations and financial measures, while leaving to the senate the general determination of state policies and the review

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[7] The following tabulated statement shows the size of the legislative bodies of those provinces of the Dominion of Canada which have the unicameral system.

PROVINCE.	LEGISLATURE.	MEMBERS.	TERM.
Alberta	"Legislative Assembly"	56	?
British Columbia	"Legislative Assembly"	42	4 years
Manitoba	"Legislative Assembly"	49	5 "
New Brunswick	"Legislative Assembly"	48	5 "
Ontario	"Provincial House of Representatives"	111	4 "
Prince Edward Island	"Legislative Assembly"	30	4 "
Saskatchewan	"Legislative Assembly"	54	5 "

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and discussion of executive action; but so great is the attraction of the money-appropriating function that in the State of California, at least, the senate has secured the main control of appropriations, while the assembly, necessarily composed of younger and less experienced men, finds that even in financial matters it is relegated to a position of less consequence and less power.

There are sound reasons for believing that American state legislatures would gain in responsibility, in attractiveness as fields of effort, as well as in mere economy, if they were reduced to a single chamber. It is nothing but the extreme conservatism of the American disposition in dealing with established institutions that has prevented the trial of a single-chamber legislature. Sooner or later some American state will inaugurate this innovation, and the chances are in favor of its exhibiting superiority over the present dualism.

There is room for great difference of opinion as to the proper size and method of choice of such a single chamber, but I am of the opinion that no single state legislative body should be smaller than the present California senate, which consists of forty members. Forty members is an almost ideal body for profitable and dignified public discussion. It is just about the size of the American senate in the days of its greatest debates. On the other hand the imperial proportions of the State of California and the extraordinary variety of occupations and interests which its vast domain presents, recommend a single legislative body of the size of the present lower house, or eighty members.

Four years is not too long a term for which to choose a legislative member, although the conservatism of a four-year term may be modified by electing half of the body every two years, and if this were done, in order that all districts might have the opportunity of expressing their judgment at each election, it would perhaps be advisable to retain the senate districts as the basis for election, and accord to each one two members to be elected alternately every two years for a four-year term.

Such a body should meet annually. Biennial meetings, or in some cases less frequent sessions, were adopted largely to check undue legislation, but the device has proved absolutely ineffective. An annual session not only permits the more timely consideration of legislation that is actually urgent, but makes it easier to defer partially considered measures until the following session. There is

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far less pressure upon a legislature which knows that it will convene again within the space of eight or nine months to rush through a vast number of hastily prepared and quite unconsidered statutes than is the case with a legislature one-half of which goes out of existence at the end of the session, and which will not reconvene for nearly two years.

An American legislature, constituted of a single chamber might well adopt an institution which has proved its value in several countries, and is known as the "permanent deputation" or the "permanent commission." This institution appears to have originated in Belgium and to have had an early origin in the practice of the Estates of the Low Countries. As constituted in modern Belgium the permanent deputation is a committee of six members chosen by each provincial council out of its membership. Between the sessions of the provincial council it plays an important part in provincial administration. Its counterpart exists in a number of modern governments, including, rather singularly, Mexico, where the Federal Congress on adjournment of session elects a permanent deputation of seven senators and eight representatives, upon whom the Constitution and laws confer important powers. Each Mexican state also has a permanent deputation of the state congress.

The uses of such a body in the State of California might be several. Chosen before the adjournment of each session by the legislature out of its own members, and composed of a number of men with the qualifications and the leisure to give continuous attention to the affairs of the state, such a standing commission might be a permanent committee upon legislation, reviewing the action of the legislature at its past session and anticipating its action during the coming session. It might reconsider projects of law left unenacted, and examine new projects sent in by members of the legislature for future consideration. The legislature might well accord to this deputation an unlimited prerogative of introducing at the opening of the session new bills, while at the same time restricting to a minimum the number of bills which a private member might introduce other than through the permanent commission. This would be one practicable way of limiting the unbridled license which overwhelms our legislature with projects of law, and which has been sufficiently commented upon. To it might also well be entrusted a considerable ordinance power, the power to frame subordinate legislation consistent with statutes of the legislature and

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designed to carry out the provisions of these statutes, which, upon receiving the approval of the governor, would have the force of law. This would relieve our laws of the immense mass of details which incumber them and would give a flexibility much to be desired. The legislative reference bureau established by the last legislature should be administered under this permanent commission.

Such a permanent commission might also, in the absence of any "cabinet body" in state administration, form an advisory council to the governor, particularly with reference to the operation and execution of the laws, and it might perform a service of immense value by close participation with the governor in the framing of what we call "administration measures."

The old theory of the separation of powers is a sham, long discarded in actual practice, and the American people will gain in certainty of effort if they fairly recognize the truth. The state governor and the state legislature can not be disassociated in the enactment of legislation. Rather must they be drawn even more closely together. The public interest does not lie in the direction of reducing the power and influence of the governor. He should on the contrary be made the actual head of the state's administrative system, and as long as the American preference runs as irresistibly as it does toward the establishment of strong men in office there will be no diminution in his power with the people or the people's representatives. But what is needed, is to restore vitality and dignity to the legislative branch, constituting it upon practical and not theoretical lines, and raising it to a position of constant and active participation in the government of the state.

David P. Barrows.

Berkeley, California.

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The California Irrigation Right

THE substantive principles of the irrigation laws of the several states and territories are embodied in leading judicial opinions which have established two lines of court decisions by which have been prescribed the two orders of water rights known as the California system and the Colorado system of irrigation law. The irrigation states are each identified with one or the other of the two systems, and their statutory regulations reiterate the theory of antecedent judicial opinions—differing, within the two groups, only in matters pertaining to details of legal procedure and methods of administration. An analysis of irrigation water rights entails, therefore, an historical examination of the judicial decisions which enunciated and established the prevailing principles of property in irrigation waters. Irrigation statutes are chiefly indicative of the popular and legislative recognition of juristic theories, and of the relative efficiency of different state governments in the administration of water rights.

Priority Water Rights Upon the Public Domain.

Upon the organization of the state government of California in 1850, property in water for industrial purposes existed only as an extra-legal right defined by the regulations and customs of the miners who had established themselves upon the public lands. Privileges in the use of water for mining and irrigation which were then enjoyed, represented, *ipso jure*, only quasi-property rights, since they were founded upon local and informal authority to divert waters for placer mining upon government lands which were not legally and formally open to "occupation and appropriation." The policy of non-interference, on the part of the federal government, made possible the private appropriation of lands and an expeditious use of adjacent streams which became customary.

A legislative act of April 13, 1850, declared the common law of England to be the rule of decision generally in California, when not in conflict with the Constitution of the United States or the

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onstitution or laws of the state.[1] But this act was not clear as to vhat should be included under the term "laws of the state." The odes of the mining districts were judicially supported and widely ecognized and administered, but they had not been acknowledged y statute. Moreover, these codes were clearly in conflict with he common law with regard to water rights on inland streams. The second legislature of California, in 1851, approached a definiion of the status of the local regulations when justices were uthorized to admit proof of "customs, usages, or regulations at the ar or diggings" in cases concerning mining claims, when such ustoms, etc., were not in conflict with the constitution or laws of he state. But this rule of evidence was not extended to higher ourts of original and appellate jurisdiction.[2] In the Revenue Act f 1854 the legislature implied its acknowledgement of the validity f the diversion and non-riparian appropriation of water by proiding for a tax upon "canals, water-races, dams, or other works or mining purposes." During a period of five years the diversion f streams for industrial purposes increased rapidly, and the prac-ice, being unchallenged, assumed the dignity of a right. *The order f the rights in the same stream invariably followed the locally ccepted doctrine of priority of appropriation, and the practice was nformally encouraged by both the federal and state governments.*[3]

The question of priority of water rights first reached the Caliornia courts in 1853.[4] This first case is of special interest, not as precedent, but because of the fact that in charging the jury the

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[1] "The Common Law of England, so far as it is not repugnant to or nconsistent with the Constitution of the United States, or the Constitution r laws of the State of California, shall be the rule of decision in all the Courts of this State." Cal. Stats. 1850, p. 219.

In the Civil Code of 1872 the right to acquire the use of water by appro-riation w s a "useful or beneficial purpose" (§ 1410-1411) was established, rovided however that the common-law rights of riparian owners be espected (§ 1422). This proviso was repealed in 1887 with the reservation nat rights already vested should not be disturbed. Cal. Stats. 1887, p. 114.

[2] Civil Practice Act, April 29, 1851, Cal. Stats. 1851, p. 51.

[3] "The Legislature has never directly adopted the local rules and cus-oms—as a body, in whole, or in part—of the respective districts, nor has authorized the miners to adopt any. Neither has it prohibited their doption in the thousand instances where they have been established and nforced. By implication, it has recognized them of binding force." Yale, Mining Claims and Water Rights, p. 59.

[4] Eddy v. Simpson (1853), 3 Cal. 249, 58 Am. Dec. 408. Suit was rought in the district court to recover damages for interference with an lleged water right claimed by virtue of prior appropriation of the waters of hady Creek, the water being used for mining purposes. The trial court ound for the plaintiff, but was not sustained by the Supreme Court and ne cause was remanded for retrial.

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trial judge strongly foreshadowed the doctrine which was to become the general rule of decisions in matters of water rights in the arid districts. The opinion of the judge was, in part as follows:

> "As a general principle, the party who first uses the water of a stream, is, by virtue of priority of occupation, entitled to hold the same. If a company or association of miners construct a ditch, to carry water from a running stream for mining or other purposes, and they are the first to use the water, locate and construct the ditch, they are legally entitled to the same as their property, to the extent of the capacity of the ditch to hold and convey water. For, if it appears that there is more water running in the stream than the ditch of the first party can hold and convey, then any other party may rightfully take and use the surplus, and it does not matter whether the excess of water be taken from a point above or below the dam of the first party."[5]

A second point of interest in this case appears in the opinion of the Supreme Court in reversing the judgment of Judge Barbour, that is, the conservative attitude of the California judiciary toward precedent and their feeling of uncertainty—almost helplessness—in dealing with new economic conditions. In this opinion, we read the following:

> "The rule laid down by the court below, while it is a departure from all the rules governing this description of property, would be impracticable in its application and we think it much safer to adhere to known principles and well-settled law, so far as they can be made applicable to the novel questions growing out of the peculiar enterprises in which many of the people of this state are embarked."[6]

The second case of importance, and that designated as the first of the line of opinions establishing the doctrine of appropriation, was Irwin v. Phillips.[7] This case involved the rights of a canal owner and appropriator of water for mining purposes, as against a subsequent settler and appropriator upon lands from which the stream had been diverted. Judge Baldwin, counsel for the respondent, argued the case without reference to the common-law doctrine of riparian rights, and made no attempt to apply a modifica-

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[5] The case was tried March 5, 1853, before Wm. T. Barbour, judge of the Tenth Judicial District of California; and so far as is known, to Judge Barbour belongs the distinction of having formulated the first judicial acknowledgment of the doctrine of appropriation in the United States. Eddy v. Simpson (1853), 3 Cal. 249, 250.

[6] The opinion was delivered by Justice Wells, Justice Heydenfeldt concurring. Eddy v. Simpson (1853), 3 Cal. 249, 252.

[7] (1855), 5 Cal. 140, 141, 63 Am. Dec. 113.

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tion of that doctrine or to interpolate the laws of custom and necessity within the purport of the common law. He maintained that the policy of the government with respect to the mineral lands of the United States created a necessity for the initiation and application of new principles by the courts. He contended that this policy was sufficiently clear to create a right of individual appropriation, subject to such limitations

> "as may be necessary to give effect to two leading principles: First, the most productive working of the mines. Second, the interest, convenience, and profit of the greatest number. But these last principles are subservient to another principle, which is necessary to give effect to these primary principles; and this principle is protection to labor and encouragement of it, which can only be given by allowing to mining claims and appropriations a right of property, with its incidents."

The argument of Counsel Baldwin was adopted by the Supreme Court, in an opinion written by Justice Heydenfeldt and concurred in by Justice Murray. The opinion of the court is, in part, as follows:

> "Courts are bound to take notice of the political and social condition of the country, which they judicially rule. In this State the largest part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and with the exception of certain State regulations, very limited in their character, a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are, as must be admitted, many things connected with this system, which are crude and undigested and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety has so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development. So fully recognized have become these rights, that without any specific legislation conferring, or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same

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manner as if they were rights which had been vested by the most distinct expression of the will of the law makers; as for instance, in the Revenue Act, 'canals and water-races' are declared to be property subject to taxation, and this when there was none other in the State than such as were devoted to the use of mining.[8] This simply goes to prove what is the purpose of the argument, that however much the policy of the State, as indicated by her legislation, has conferred the privilege to work the mines, it has equally conferred the right to divert the streams from their natural channels, and as these two rights stand upon an equal footing, when they conflict, they must be decided by the fact of priority, upon the maxim of equity, *qui prior est in tempore potior est in jure*..

"The miner who selects a piece of ground to work, must take it as he finds it, subject to prior rights, which have an equal equity, on account of an equal recognition from the sovereign power. If it is upon a stream the waters of which have not been taken from their bed, they cannot be taken to his prejudice; but if they have been already diverted, and for as high and legitimate a purpose as the one he seeks to accomplish, he has no right to complain, no right to interfere with the prior occupation of his neighbor, and must abide the disadvantages of his own selection."[9]

In this decision and opinion, a well defined position was taken in opposition to the maintenance of property rights in natural waters as known to the common law, though the common law was nominally the rule of decision in California prior to that time. The innovation was frankly based upon facts of physical conditions and necessities of social and economic relations resulting therefrom. It is noteworthy that this opinion unfolds the salient principles of the present-day irrigation water right, as confirmed by the doctrine of *priority of appropriation and beneficial use*. The principles of Baldwin and Heydenfeldt were not accepted, however, without contest. For thirteen years the judicial precedent stood without legislative sanction, and certain vested interests and juristic conservatives waged a stubborn opposition in the courts of California until 1862.[10] The doctrine of appropriation was not fully supported

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[8] Section 2, Art. IX, of the same act, provides for the assessment of the property of companies and associations. Among objects mentioned are "dam or dams, canal or canals, or other works for mining purposes."

[9] Irwin v. Phillips (1855), 5 Cal. 140, 146, 63 Am. Dec. 113.

[10] "There are two antagonistic interests in the state, each endeavoring to control the legislature, and to shape the legislation entirely in its own behalf, to the complete exclusion of the other. These are the riparian proprietors, who assert their common-law rights, and would exclude all other classes from the participation in the waters of the streams however abund-

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by the United States Supreme Court until 1874.[11] Although this court did not even then pass directly upon the question, it became clear that water-rights controversies were to be decided in accord with the customs, laws, and decisions prevailing in the respective states and territories. This policy was confirmed by a decision in 1890, in which the court said: "The local custom is set forth . . . . to have consisted in the recognition and acknowledgment of 'the right to locate water rights, and to divert, appropriate and use the waters of flowing streams for purposes of irrigation, when such location, diversion and use does not conflict or interfere with rights vested and accrued prior thereto.' Thus, under the laws of Congress and the Territory (Dakota), and under the applicable custom, priority of possession gave priority of right."[12]

The final word in the recognition of the frontier doctrine of appropriation and of the authority of a state in its application to the use of irrigation waters was pronounced in 1907 by the United States Supreme Court, in Kansas v. Colorado.[13] The court asserted that

> "each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters. It may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the West of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any State."

It should be borne in mind, in connection with the evolution of the arid-land water right, that up to 1856, questions of the use of water in California concerned only the mining industry; and the locus of water rights, with few exceptions, was confined to the mineral lands of the public domain not legally open to occupation and settlement. The newly developed property right in natural

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ant; and the communities of land owners away from the banks of the streams who deny any rights of the riparian proprietors, and claim a free, unrestricted access to and appropriation of all material streams, limited only by the extent of their own needs." Black's Pomeroy on Waters, p. 349. See also Crandall v. Woods (1857), 8 Cal. 136; McDonald v. Bear River Co. (1859), 13 Cal. 220; Logan v. Driscoll (1862), 19 Cal. 623.

[11] Atchison v. Peterson (1872), 1 Mont. 561; Basey v. Gallagher (1874), 87 U. S. 670, 22 L. Ed. 452; Jennison v. Kirk (1878), 98 U. S. 453, 25 L. Ed. 240.

[12] Sturr v. Beck (1890), 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

[13] Kansas v. Colorado (1906), 206 U. S. 46, 93, 51 L. Ed. 956, 27 Sup. Ct. Rep. 655.

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waters was popularly assumed to be the special prerogative of miners, which distinction the legislature sought to establish by statute in 1854.

Riparian Rights Upon Private Estates.

The federal act of July 26, 1866,[14] together with the judicial decisions noted above, clearly established the right to appropriate the use of water flowing upon the public lands in the state of California. The doctrine of priority of appropriation for beneficial use, irrespective of the common law, has since been universally held and understood to fix the order of water rights *upon the public domain* and the custom preceded the right by twenty years. The question of the application of these principles upon private estates became pertinent upon the granting of private title in California lands under the federal law.

The determination of the respective water rights incident to and subsequent to public and private estates, necessarily entails a declaration as to the precise *source* of the right to use the waters of natural streams; and upon this point has centered the chief conflict over irrigation rights in the United States. A California decision of 1857 attempted to sustain the common-law riparian right upon private estates against all priority rights except such as were established while the land was still a part of the public domain.[15] Because of the indirect bearing of this case and the uncertain nature of the opinion the decision has not been recognized as a ruling precedent.[16] In spite of scattering implications to the

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[14] The Congressional act of July 26, 1866 declared that mineral lands of the United States were free and open to exploration and occupation, subject to such regulations as might be prescribed by law and the local customs or rules of the inhabitants of the several districts, as far as the same were not in conflict with the laws of the United States. The act further provided that water rights established by priority of possession should be maintained and protected, and the right of way for canals and ditches for the purpose of diverting water for mining, agricultural, or mechanical use was acknowledged and confirmed. Supplementary acts of July 9, 1870 and May 10, 1872, made all subsequently issued land patents subject to previously recognized water rights.

[15] Crandall v. Woods (1857), 8 Cal. 136. In this case it was advanced that the rule established in Irwin v. Phillips was by no means exclusive of riparian rights, but that such rights attach to the land through which a stream flows, in favor of settlers thereon, as against all but appropriations actually made prior to the settlement of the land.

[16] The opinion has been deemed somewhat biased because of the fact that it was uttered by Justice Murray at a time when he was attempting to shape the doctrine of appropriation as a modification of the common-law rule and not to be recognized as the basis of an independent system. Wiel, Water Rights in the Western States (1st Ed.), p. 33. Moreover, the

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contrary,[17] the prevalent impression, prior to 1886, was that the common-law doctrine of riparian rights had been rejected *in toto* in California.[18]

In 1886, in the case of Lux v. Haggin, the Supreme Court of California established a definite principle as the basis of water rights in that state which remains the rule of decision to the present day. The case involved the right to the use of the waters of Kern River in the San Joaquin Valley, and the plaintiffs invoked the doctrine of riparian rights to relieve them from injury resulting from the appropriation of the waters of the stream for purposes of irrigation. The lower court found neither party to be a *riparian* owner and decided in favor of the defendant. The plaintiffs, however, alleged riparian rights and appealed to the Supreme Court of the state. The Supreme Court applied the law to the issues as made by the pleadings and left the facts to be determined by a new trial. In an opinion occupying nearly two hundred pages of the California Reports, the plaintiffs were sustained in their alleged supremacy of the riparian right over subsequent appropriations for use, three of the seven members of the court dissenting.[19] The court maintained that the rule of priority of appropriation was unknown to the common law,[20] but that, although independent of the common-law doctrine of riparian rights, it was not destructive thereof. *Appropriation* was sustained as the basis of rights in the use of water upon public lands; but the riparian right of the common law was declared to attach to all land as soon as it becomes private, remaining subject to appropriations made prior to that time, and free from hostile appropriations thereafter.[21] It was further advanced that riparian rights were to be protected upon constitutional principles, and that their abrogation permitted the

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riparian estate under discussion was a mining claim, and the use desired quite foreign to the common law. Only two or three times has a court attempted to use this opinion as a precedent.

[17] "We have recognized the right to appropriate where no riparian rights intervene." Conger v. Weaver (1856), 6 Cal. 548. 65 Am. Dec. 528. "Possession, or actual appropriation, must be the test of priority in all claims to the use of water, whenever such claims are not dependent upon the ownership of the land through which the water flows." Kelley v. Natoma Water Co. (1856), 6 Cal. 105.

[18] Pomeroy on Waters, § 108; Wiel, Water Rights in the Western States, p. 33; Lux v. Haggin (1886), 69 Cal. 255, 4 Pac. 919, Dissenting opinion.

[19] Lux v. Haggin, supra, n. 18.

[20] Ibid, pp. 387-389.

[21] Ibid, pp. 368, 375, 380.

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taking of property without due process of law and made possible an unwarranted interference by the state with the primary disposal of the federal lands.[22]

Lux v. Haggin clearly established a restricted form of common-law riparian rights in California, but the doctrine of appropriation was simultaneously acknowledged and is still recognized—both judicial and statutory law grant the two doctrines concurrent existence as the respective bases of two contemporaneous systems of water rights in that state. In theory, the two systems are of equal importance and command equal consideration by the courts but, as the lands of California passed into private ownership, the common-law principle, although gradually modified, acquired a widened sphere of application, while the field of priority rights has proportionately narrowed.

The bifurcated garment of irrigation jurisprudence evolved

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[22] Upon the first appeal, Justice Sharpstein contrasted the contending doctrines of riparian rights and appropriation in the following terms: "But it is insisted by respondent's counsel that both the United States and the State have adopted a policy, in respect to water flowing over their lands, which is inconsistent with the doctrine of riparian rights as we construe it. As a result of that policy, it is claimed that a grant of land by either of those governments must be read as if it contained a condition that any one should, thereafter, be at liberty to appropriate so much of the water of any natural stream running over such lands as the grantee had not previously appropriated to some useful purpose other than that which is subserved by flowing naturally over such land. That would constitute a reservation of an interest in the land granted, not for the benefit of the grantor, but for that of any other person who might choose to avail himself of it. If a grant does not contain any such expressed reservation or condition, we ought not to interpolate one unless it is clearly implied, because the general rule is that the owner of property cannot be divested of any interest in it by the simple prior appropriation of that interest in it by some one else. Both, the State and the United States governments have granted to private persons and corporations large tracts of land which have remained unoccupied and in their virgin state for many years afterwards. It probably never occurred to any one that the owners, by neglecting to appropriate the grasses and trees naturally growing on such lands to some useful purpose, left them open and subject to a rightful appropriation by some one else. And yet we have the same authority for holding that a simple grant of land conveys a right to have the water flowing over it continue so to flow, as we have for holding that it conveys a right to the trees and grasses growing on it, or to the soil itself. The principle that he who first appropriates property to a useful purpose is best entitled to it, applies only to cases in which none of the parties has a grant, actual or presumptive."

The opinion in Lux v. Haggin was concurred in by Justices McKinstry, McKee, Sharpstein, and Thornton. Justices Morrison, Ross, and Myrick dissented—affirming that the adoption of the common law, by act of legislature, April 13, 1850, "was not intended to and did not establish a rule of decision as to the right of appropriation of water for irrigation," and that, if applied, the common law must be interpreted in the light of conditions prevailing in the country in which the application is made. Ibid, p. 440.

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from the opinion of a divided court in Lux v. Haggin is known as the California system and has been essentially adopted in the states of California, Oregon,[23], Washington,[24] Montana,[25] North Dakota,[26] Nebraska,[27] Texas,[28] Kansas,[29] and South Dakota.[30]

The law, as established by the ruling decision, has since been supplemented by precision as to the time of the inception of water rights and the manner in which they may divest. Rights of riparian proprietors are held to attach simultaneously with the acquisition of private title in the land, and will thereafter be protected, in a reasonable and proportionate use against subsequent appropriation.[31] Water rights, having been acquired by non-riparian proprietors, may be divested by grant from such proprietors, or by operation of law, through prescription, adverse user, or condemnation.[32] In controversion of the common law, riparian rights have also been made subject to valuation apart from the land[33] and to condemnation under eminent domain, and to extinction by prescription and adverse use, and to accomplish this, statutes and court decisions in states of the California system have

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[23] Carson v. Gentner (1898), 33 Ore. 512, 52 Pac. 506.

[24] Benton v. Johncox (1897), 17 Wash. 277, 49 Pac. 495; Sander v. Wilson (1904), 34 Wash. 659, 76 Pac. 280.

[25] Smith v. Denniff (1900), 24 Mont. 20, 60 Pac. 398.

[26] Bigelow v. Draper (1896), 6 N. Dak. 152, 69 N. W. 570.

[27] Crawford Co. v. Hathaway (1903), 67 Neb. 325, 93 N. W. 781.

[28] McGhee, etc. Co. v. Hudson (1893), 85 Tex. 587, 22 S. W. 398; Mud Creek etc. Co. v. Vivian (1889), 74 Tex. 170, 11 S. W. 1078; Watkins Land Co. v. Clements (1905), 98 Tex. 578, 86 S. W. 733.

[29] Clark v. Allaman (1905), 71 Kan. 206, 80 Pac. 571.

[30] Lone Tree Ditch Co. v. Cyclone Ditch Co. (1902), 15 S. Dak. 519, 91 N. W. 352. The riparian right was previously affirmed in Dakota Territory by the United States Supreme Court in Sturr v. Beck (1890), 133 U. S. 541, 33 L. Ed. 761, 10 Sup. Ct. Rep. 350.

[31] That section of the California civil code (§ 1422) which sustained the common law as the general rule of decisions was repealed in 1887—the year following the decision in Lux v. Haggin, Cal. Stats. 1887, p. 144. The repeal is held, however, not to affect the rights of riparian proprietors since the leading case was decided independently of the code provision.

"Recent cases in California show a decided tendency to cease citing the older cases on appropriation, assuming the doctrines there laid down as established and familiar law. This indicates that in California the law of appropriation has taken its place as a complete system, past the formative period in which the system may be said to remain in younger states." Wiel, Water Rights in Western States, op. cit., p. 36. Benton v. Johncox (1897), 17 Wash. 277; Sturr v. Beck (1888), 6 Dak. 71; Sturr v. Beck (1889), 133 U. S. 541.

[32] Mills, Irrigation Manual, p. 30, and cases there cited.

[33] San Joaquin & Kings River Co. v. Stanislaus County (1914), 191 Fed. 898; San Joaquin & Kings River Co. v. Stanislaus County (1914), 233 U. S. 454.

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declared *the use of waters of natural streams for beneficial purposes to be a public use.*[34]

The constitution of California recites that "the use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law."[34a] A recent decision of the Supreme Court of California has finally interpreted the legal significance of this "public use." "Under the law of this state, ... the water right which a person gains by diversion from a stream for a beneficial use is a private right. The same is true as to water rights in streams upon the public domain in California. The title and ownership is private and the only interest of the public is that of beneficiaries of the use or trust. The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and dedication are distinct."[35]

An act of April 8, 1911, amended the Civil Code so as to declare "all water or the use of water, within the State" to be "the property of the people of the State of California." The interpretation, by the Supreme Court, of this amendment to the Code, seems to strip it of any probable importance in relation to water rights within the state. It is not retroactive. The only effect which it may have is to dedicate to general public use any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on the streams, which it would, in such cases, have in common with owners of other abutting land. All previously established rights, whether riparian, or prescriptive, remain unaffected.[36]

The Supreme Court of California in 1915 reaffirmed the legal superiority of the riparian water right in that state in such positive terms as to leave no room for doubt concerning the juristic policy

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[34a] Cal. Const. Art. XIV, § 1.

[34] Lux v. Haggin, supra, n. 18; Cal. Pastoral & Agricultural Co. v. Madera Canal & Irri. Co. (1914), 167 Cal. 78, 138 Pac. 718; Border v. Trespalacios R. & I. Co. (Texas, 1904), 82 S. W. 461, 98 Tex. 494, 86 S. W. 11, 107 Am. St. Rep. 640; Bullderick v. Hermsmeyer (1905), 32 Mont. 541, 81 Pac. 334.

[35] Thayer v. California Development Co. (1913), 164 Cal. 117, 128 Pac. 21.

[36] Cal. Civ. Code, § 410; Palmer v. Railroad Commission (1914), 167 Cal. 163, 175, 138 Pac. 997.

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underlying the present California system of irrigation law. Reviewing the judicial decisions since Lux v. Haggin, the court said:

> "These decisions show that while an appropriation or diversion made upon lands of the United States gives the appropriator or diverter a right to the water as against the United States it does so solely because, by the act of Congress of July 16, 1866, the United States declared that such diversion, if recognized by local laws, should be effectual to confer upon the diverter the riparian rights in the stream pertaining to the land of the United States abutting thereon, that it gives no right as against other landowners, that it does not take place upon the theory that the water is held by the United States for public use, but because, as proprietor of the land, the United States, by that act, granted a part of its property in its land to such diverter. Also they show that the appropriator under the Code may obtain a similar right as against riparian rights of the state pertaining to any lands which the state may own along the course of the stream; but that this right may be thus acquired, solely because the state in section 1410 of the Civil Code has so declared, and that this declaration binds the state as to its proprietary lands, but does not affect lands of other persons, or water rights pertaining to such other lands, and that, except its riparian rights pertaining to lands which it owns bordering upon non-navigable streams, the state has no right to the waters thereof and, consequently, cannot dispose of any other rights."[37]

The supreme courts of Nebraska and Oregon have partially removed those states from the effect of the common-law right as it obtains in the other states of the California system. In 1903, the Nebraska court construed the state irrigation law of 1889 as having abrogated the rule of riparian proprietorship in the acquisition of water rights since that time; maintaining, however, that riparian rights which had accrued prior to the enactment of the law should be protected.[38] In 1908, the Oregon court placed a similar construction upon the Federal Desert Land Act of 1877; that is, that public lands entered after that date were accepted with the implied understanding that, except as to use for domestic purposes, the first to appropriate and use the water for irrigation should have the superior right.[39]

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[37] Duckworth v. Watsonville Water & Light Co. (1915), 170 Cal. 425, 432, 150 Pac. 58.

[38] Crawford Co. v. Hathaway (1903), 67 Neb. 325, 93 N. W. 781.

[39] Hough v. Porter (1908), 51 Ore. 318, 95 Pac. 732. These rulings have, however, mainly served to enlarge the degree of elasticity or the sphere of judicial discretion in defining water rights.

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THEORY OF THE CALIFORNIA WATER RIGHT.

By the treaty of Guadalupe Hidalgo, Feb. 2, 1848, the United States succeeded to the Mexican title and became the sole owner of the lands and natural waters of the so-called Mexican Cession, with the exception of certain private estates created by prior grants from the Mexican government which the United States respected.

The theory upon which present water rights rest in this country assumes that, in the absence of statutes, the common law became operative simultaneously with the acquisition of title by the United States. Under a strict interpretation of the common law, the federal government succeeded to a complete riparian proprietorship in its waters when it became sole proprietor in fee simple of the land. These property rights, until transferred to private persons, have been held by the United States exactly as in private ownership, with the exception that they are not taxable. Upon these grounds, it is maintained that the United States, as sole proprietor, had unlimited right to do with the streams upon its land as it chose. It could (1) transfer the land together with the use of the water thereon as an incident thereto, or (2) it could grant each separately, and, furthermore, (3) lawful grants could be expressed, or could be implied by non-interference.

Up to 1866, the United States acquiesced in the customs and regulations established by the California miners which permitted the separate appropriation of the water. In fact, land and water were customarily appropriated separately, and, by the acts of 1866 and 1870, such implied grants of separate appropriations were confirmed and future titles were guaranteed when the appropriations were upon government land. It is further held that the government has chosen to transfer a part of its lands, together with incident riparian rights, under the generally accepted meaning of the common law, and that such a transfer is presumed when the water upon the land has not previously been separately granted.[40]

In Lux v. Haggin, the court said:

> "Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on

[40] Lux v. Haggin, supra, n. 18; Mills, Irrigation Manual, p. 28 and cases there cited; Kinney, Irrigation & Water Rights (1st Ed.), §§ 135, 148, 188; Wiel, Water Rights in Western States (2d Ed.), p. 49 et seq; Pomeroy and Farnham, passim.

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> the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the State of California as the owner of innavigable streams and their beds. And since the act of Congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, such rights have always been claimed to be deraigned by private persons under the act of Congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations, made with its presumed sanction and approval."[41]

Courts of other states, in sustaining the California system have held that, "As the United States . . . . owns the waters which are an incident to its lands, it can dispose of them separate from its lands if it chooses,"[42] and that "The water in an innavigable stream flowing over the public domain is a part thereof, and the national government may sell or grant the same, or the use thereof, separate from the rest of the estate, under such circumstances as may seem to it proper."[43]

The origin of the priority property right in water—a grant from the United States to the appropriator—as recognized by the California system, has frequently been reiterated in judicial opinions. In the language of Justice Baldwin, in Ortman v. Dixon,[44] "We hold the absolute property in such cases to pass by appropriation as it would by grant." Other courts have held the appropriator of water on the public domain to be "a licensee of the general government," and that when such parts of the public lands pass into private ownership they are "burdened by the easement granted by the United States" to the prior appropriator of the water.[45] It is further asserted that a grant of the separate use of water must issue from the owner of both the land and the water, and "The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States government as the owner of the land and water,"[46] and, "under the law of Congress, a grant of the kind of property in question is pre-

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[41] Lux v. Haggin (1886), 69 Cal. 255, 338.
[42] Cruse v. McCauley (1899), 96 Fed. 369, 374 (Montana).
[43] Howell v. Johnson (1898), 89 Fed. 556 (Montana).
[44] (1859), 13 Cal. 33.
[45] Smith v. Hawkins (1895), 110 Cal. 122, 42 Pac. 453.
[46] Smith v. Denniff (1899), 24 Mont. 20, 60 Pac. 398.

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sumed by the act of appropriation."[47] The right of appropriation and user, being deemed a grant from the United States to the appropriator, it is assumed that the grantor had authority to impose conditions and did so by the recognition of prevailing local customs and voluntary regulations which required that the appropriator should make a "beneficial use" of the water diverted.[48]

The Supreme Court of California in 1912 clearly alleged the prevalence of a theory of the law in that state which should make *beneficial use the primal and ultimate sanction of the right to appropriate water for purposes of irrigation*:

> "It is the well-settled law of this state that one making an appropriation of the waters of a stream acquires no title to the waters, but only a right to their beneficial use, and only to the extent that they are employed for that purpose. His right is not measured by the extent of his appropriation as stated in his notice or by his actual diversion from the stream, but by the extent to which he applies such waters for useful or beneficial purposes. Beyond that, his appropriation or diversion of more than can be applied by him gives him no right to the excess, and this is subject to appropriation by any other person who may use it for similar beneficial purposes."[49]

We may not conclude, however, that this socially beneficial and universally applauded principle of irrigation water rights is no longer trammeled in California by the skeleton of legal legitimism and exclusive vested rights; for we read in the *obiter dicta* of the same court, in 1915:

> "It may well be that there is room for an even need for legislation which will require riparian proprietors to exercise their irrigation rights in the use of water within a limited period, or be decreed to have waived those rights. Other similar legislation making for the general good will readily occur to one's mind. But it is not the province of this court to legislate, and it would be abhorrent to justice now to say to an upper riparian proprietor, who has rested in security upon the rights which this court has over and over again declared to be his, *that he has lost those rights through no fault or failure of his own, but simply because he has not seen fit to use the waters upon his riparian land.*"[50]

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[47] Barkley v. Tieleke (1874), 2 Mont. 59.

[48] Wiel, Water Rights in Western States (1st Ed.), p. 53; Pomeroy on Waters, § 32; Kinney, Irrigation & Water Rights, § 147.

[49] Hufford v. Dye (1912), 162 Cal. 147, 153, 121 Pac. 400.

[50] Miller & Lux v. Enterprise Canal & Land Co. (1915), 169 Cal. 415, 147 Pac. 567.

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The effective theory of the California water right is mainly the product of what may be called the *legitimist school of juristic thought.* The California water right owes its legal sanction to that philosophy which grants prevalence to time-established principles because of former recognition and application, *proprio vigore,* rather than because of fitness to actual and potential economic and social needs. The right is based upon the theory that the common law of England contains, in germ or development, all legal principles essential or beneficial to society. Novel climatic conditions and resulting economic necessities in California have been met by perennial judicial amendment and temporizing reinterpretation of the common-law concepts of property and contract, rather than by positive and constructive measures. Considered in the light of the theory and origin of law, California has established a hybrid practice in the acquisition, use, and transfer of property in water,—a practice in fact unknown to the tenets of the common law, which, nevertheless, is its judiciably determined *mater familias.*[51] Finally, the California theory of irrigation water rights assumes that the sovereignty which passed from Mexico to the United States was a common-law property in the lands and the natural waters thereon; consequently, rights in such lands and waters may be granted to private owners within limits established by the common-law conception of property, but beyond which the government, never having owned, has nothing with which to part and cannot confer title. The government may confer, by specific

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[51] In evidence of the judicial recognition of this fact, such opinions as the following are not infrequent:

"The business of gold mining was not only new to our people, and the cases arising from it new to our Courts, and without judicial or legislative precedent, either in our own country or in that from which we have borrowed our jurisprudence; but there are problems intrinsic in the subject itself that it is almost impossible to settle satisfactorily, even by the application to them of the abstract principles of justice." Justice Burnett, in Bear River Water Co. v. N. Y. Mining Co. (1850), 8 Cal. 327, 332.

"There are many questions of great doubt and difficulty, peculiar to the Pacific coast, to which I have not even alluded." Black's Pomeroy on Riparian Rights, p. 348.

"Various problems in connection with the fair apportionment and economic use of the waters of this state never came within the purview of the common law. They have been of necessity, and must continue to be solved by this court as cases of first impression, and if the rule of decision at common law is found unfitted to the changed conditions in this state, so that its application will work wrong and hardship rather than betterment and good the court will refuse to approve and follow the doctrine." San Joaquin etc. Co. v. Fresno Flume & Irri. Co. (1910), 158 Cal. 626, 112 Pac. 182.

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or implied terms, property in water for industrial purposes, and the lands, thereby deprived of their riparian rights, will thereafter remain so denuded. But if, at the time of the sale or granting of the land by the government, there shall have been no prior grant of the waters to which it is riparian, the common-law right in such waters passes with the land.

This riparian right is, theoretically, subject to forfeiture by non-use and prescriptive appropriation, being thus converted, by due process of law, to a property right which is economically sanctioned by beneficial use. In practice, this very desirable transition of impotent common-law rights to fruitful priority usufructs is not now legally expedient, or, indeed, in any considerable degree, possible. The statutory period of prescription in California is five years. At any time during this period a riparian proprietor may enjoin an adverse appropriator upon the theory that such a use is an interference with his freehold which is entitled to restrain lest it ripen into a prescriptive right. The Supreme Court has repeatedly authorized such restraint without requiring a showing of material damages on the part of the riparian owner.

Under this conception of the law, the several states may not themselves define real property within their borders. The proprietors of rights in land or water which was once a part of the public domain derive their property rights from the United States, as *land owner* under the property concept of the common law, but neither from the state nor the general government as *law maker*.[52] The legislative power of the United States would thus appear to be limited to the principles of the common law, and that of the states to the procedure of their courts, and to matters within the police power—the states being subject of course to the constitutional admonition against trespassing on the powers of congress or infringing the guarantees of vested rights.

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[52] Lux v. Haggin, supra, n. 18; Cal. Pastoral & A. Co. v. Madera Canal & Irri. Co. supra, n. 34; Duckworth v. Watsonville Water & Light Co. (1915), 170 Cal. 425, 150 Pac. 58; Cal. Civ. Code, § 1410; Willey v. Decker (1903), 11 Wyo. 496, 73 Pac. 210; White v. Farmers' C. & R. Co. (1896), 22 Colo. 191, 43 Pac. 1028; Wiel, Water Rights in the Western States, (3rd Ed.), p. 86.

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Summary of Characteristics of the California Irrigation Right.

The California system of irrigation jurisprudence may be said to recognize the following principles as fundamental in the law of inland waters:

1. Property rights in the use of inland waters exist by virtue of (a) Mexican grants under the civil law; (b) riparian proprietorship under the common law; (c) prior appropriation upon the public domain as justified by the customs of the country; (d) conversion of either riparian or priority rights by subsequent appropriation through non-use, declaration of right, adverse use and prescription. The priority right, however, is a derived right, being originally a separate grant of the water-privilege of a riparian property.

2. An appropriation is construed to be a grant from the United States, as proprietor of the public domain, of the use of waters on or adjacent to its lands, and limited only by the total right which the government has in such waters. The right is private property; the use is a "public use."

3. The relation between successive appropriators is that he who is first in time is first in right to the extent of his appropriation and application to beneficial use; and rights in the surplus accrue to subsequent appropriators, each in his turn and to the extent of his use.

4. Between riparian proprietor and appropriator, the relation is that of successive grantees from the same owner. They are independent and priority of title governs; but with the one it is priority of location and occupation of riparian lands, and with the other it is the order of diversion and appropriation of the water. In either case, the surplus over the needs and uses of the grantee, not being included in his grant, remains for the benefit of subsequent riparian proprietors or appropriators.

5. The old common-law limitations as to diminution of quantity or change of quality of waters is in no case imposed as regards rights in non-navigable streams. The perpetuity and non-separable attachment of the common-law water right to riparian estates no longer obtain, with respect to the riparian water right of California.

R. H. Hess.

University of Wisconsin,
Madison, Wis.

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Comment on Recent Cases

BILLS AND NOTES: ASSIGNMENT ON BACK OF NOTE AS INDORSEMENT.—The question as to whether an assignment on the back of a promissory note is a qualified or a general indorsement depends for its answer on the principles of legal construction. The Oklahoma court in *Copeland v. Burke*,[1] held that writing on the back of a note "I transfer my right, title and interest in the same" is a general, not qualified, indorsement. The case undoubtedly follows the numerical weight of authority.[2]

The Negotiable Instruments Law and the California code state the general common law rule that one who puts his name on the

[1] (1916), 158 Pac. 1162.

[2] Maine Trust & Banking Co. v. Butler (1891), 45 Minn. 506, 48 N. W. 333, 12 L. R. A. 370; Markey v. Corey (1895), 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117; Beherns v. Kirkgard (1912), Tex. Civ. App., 143 S. W. 698; Farnsworth v. Burdick (1915), 94 Kan. 749, 147 Pac. 863; Hurt v. Wiley (Georgia, 1916), 89 S. E. 494; Daniel, Negotiable Instruments, § 688c.

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back of a negotiable instrument is a general indorser, unless he indicates his intention to qualify the indorsement by appropriate words, thus making himself liable merely as assignor.[3] Where the name appears as the signature to an assignment on the back of the note, the question is as to whether the implication of a general indorsement arising from the signature, or the implication of qualified liability arising from words of assignment, shall prevail.

The cases on the subject represent two lines of authority, one holding such a writing to be a general indorsement, the other holding it to be nothing more than an assignment. The former is founded on the maxim, "The expression of those things which are tacitly implied operates nothing;"[4] the latter reasons from the maxim, "The expression of one thing is the exclusion of another."[5]

The latter, on the whole, seems the better view; and it is supported by strong arguments and sufficient authority.[6] The assignment is a contract, and is to be construed by the usual rules of construction. The intention, therefore, will control, and any words demonstrating the intention of the indorser to qualify the indorsement will have that effect.[7] Distinctions have been made between the use of the words "I assign" and "I assign my interest,"[8] the intention to assign being much clearer in the latter case, since the transferor does not pretend to assign more than his particular interest; but it would seem that mere assignment is intended from the very word "assign." The presence of the signature should not control, for the assignment is not intended as an enlargement on the signature, but the signature is intended as nothing more than a part of the assignment written above. And it may well be argued that if liability as indorser was intended, why use so many words—words, too, which ordinarily indicate a lesser liability—when no words at all would have had the effect desired?[9] The expression of the purpose with which the name is indorsed excludes the implication of any other purpose, for no implication should be made contrary to a manifested intention.[10] The words of assignment, there-

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[3] Oklahoma Revised Laws, 1910, §§ 4113, 4088; Negotiable Instruments Law, §§ 63, 38; Cal. Civ. Code, §§ 3108, 3118.

[4] Maine Trust & Banking Co. v. Butler, supra, n. 2; Davidson v. Powell (1894), 114 N. C. 575, 19 S. E. 601; Adams v. Blethen, 66 Me. 19, 22 Am. Rep. 547.

[5] Spencer v. Halpern (1896), 62 Ark. 595, 37 S. W. 711, 36 L. R. A. 120; Hailey v. Falconer (1858), 32 Ala. 536.

[6] May v. Dyer (1893), 57 Ark. 441, 21 S. W. 1064; Evans v. Freeman (1906), 142 N. C. 61, 54 S. E. 847; Gale v. Meyhew (1910), 161 Mich. 96, 125 N. W. 781; and cases cited supra, n. 5. Also 12 Harvard Law Review, 566; Williston, Commercial Law and the Law of Negotiable Instruments, § 275; Tiedman, Commercial Paper, §265.

[7] Hailey v. Falconer, supra, n. 5; Bond v. Holloway (1897), 18 Ind. App. 251, 47 N. E. 838.

[8] Aniba v. Yeomans (1878), 39 Mich. 171; 24 Harvard Law Review, 58.

[9] Spencer v. Halpern, supra, n. 5.

[10] Broom's Legal Maxims (8th ed. by Chitty) 510.

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fore, being expressed, should be considered a qualified indorsement; and any different construction, it would seem, renders the transferor liable on a warranty which he has plainly indicated he did not intend to undertake.

E. W. D.

CONSTITUTIONAL LAW: CONSTRUCTION OF FISH AND GAME ACT.—"The Legislature may provide for the division of the state into fish and game districts, and may enact such laws for the protection of fish and game therein as it may deem appropriate to the respective districts."[1] Although this section was added to the constitution in 1902, its effect has never been fully determined. *In re Cecinino*[2] held that this section took from the county board of supervisors all power they had formerly held to regulate fish and game, and vested it exclusively in the state legislature, and that consequently an ordinance of the local body, passed after 1902, was unconstitutional, and no conviction could be valid under such ordinance. This opinion is rested largely upon ex parte Prindle,[3] without noticing the fact that in the latter case but two judges of the District Court of Appeal concurred in this construction, and therefore that no official opinion exists.

In the principal case, the court holds that as "may" in the amendment is mandatory upon the legislature, the right to control fish and game is exclusively in the legislature, and action by the local body is unconstitutional. This raises the question whether "may" should be interpreted as mandatory rather than permissive.

It is a general rule that where it is provided that a board or council "may" act, and either the rights of third persons are in question, or a duty to act is present, then "may" is interpreted to mean "must."[4] But the case of the legislature of a state presents a different problem. Its power is from its nature in the highest degree discretionary.[5] It would seem, therefore, that a distinction should be drawn between inferior bodies, which can be compelled to act by mandamus, and the legislature, which the court admits "could not be compelled by any known legal process to legislate upon the subject of fish and game." Now, if the legislature cannot be compelled to act, how can we say that it "must" act? It would seem that "may," therefore, is merely permissive.

This view is further strengthened by reference to another section of the Constitution of California.[6] "Any county, city, town, or township may make and enforce within its limits all such local,

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[1] Cal. Const., Art. IV, § 25½.
[2] (Aug. 9, 1916), 23 Cal. App. Dec. 239.
[3] Ex parte Prindle (1905), 94 Pac. 871 (not officially reported).
[4] Supervisors v. United States (1866), 71 U. S. 435, 18 L. Ed. 419; Hayes v. County of Los Angeles (1893), 99 Cal. 74, 33 Pac. 766.
[5] Cooley on Constitutional Limitations (7th ed.), 126.
[6] Cal. Const., Art. XI, § 11.

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police, sanitary, and other regulations as are not in conflict with general laws." The control of fish and game falls within the police power.[7] It is a general rule of constitutional interpretation that two sections, conflicting or partially conflicting, are to be read together as a harmonious whole in so far as possible, the more definite to control the more general.[8] The newer section does not expressly repeal the older in regard to the powers of local bodies to regulate fish and game. Its purpose is rather to increase the power of the legislature. The powers of the legislature are not limited by those of local bodies, but are absolute for making general laws. Prior to 1902, this limitation as to general laws prevented the legislature from dividing the state into fish and game districts and making different rules for each. To remove this restriction was the purpose of the amendment. Therefore, the later section does not expressly exclude control of fish and game under the older; the older is repealed only pro tanto; and the local bodies would seem to have power to act until the legislature asserts its rights. Accordingly, it has been held that the amendment of 1902 did not of itself repeal the local rules in force at its adoption, and that these rules remained effective until the legislature acted.[9] If the view that the state legislature and the various local bodies have concurrent powers is accepted, ordinances passed by a county board of supervisors, subsequent to the adoption of the amendment and prior to the passage of conflicting laws by the legislature, are constitutional, and convictions under them are valid.

J. L. K.

CONTRACTS: JOINT OR JOINT AND SEVERAL?—Contracts are either several, joint, or joint and several, according to the intention of the parties to the contract. The intention is gathered from the construction and interpretation of the language used. It has been generally held that a promise, or obligation, undertaken by more than one person, will be presumed to be joint, in the absence of an express intent to make it several, or joint and several.[1] If the language in the contract is ambiguous the surrounding circumstances and the interests of the parties will be looked at in determining what the intention of the parties was.[2]

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[7] Ex parte Maier (1894), 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; Lawton v. Steele (1894), 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499.

[8] Cooley on Constitutional Limitations (7th ed.), 92; Martin v. Election Commissioners (1899), 126 Cal. 404, 58 Pac. 932.

[9] In re Cole (1909), 12 Cal. App. 290, 107 Pac. 581.

[1] Elliot v. Bell (1893), 37 W. Va. 834, 17 S. E. 399; City of Philadelphia v. Reeves (1865), 48 Pa. St. 472; White v. Tyndall [1888], 13 App. Cas. 263.

[2] Ernst v. Bartle (1800), 1 Johns. Cas. 319; Eller v. Lacy (1894), 137 Ind. 436, 36 N. E. 1088; White v. Tyndall [1888], 13 App. Cas. 263.

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In the case of *Shelton v. Michael*,[3] the plaintiff entered into an agreement with the defendants, nine in number, engaging to construct a wagon road, from their timber claims to a public highway, for which they were to pay a certain sum. The contract was silent as to the nature of the defendant's obligation. The court held the obligation to be joint and several inasmuch as all of the defendants received some benefit from the construction of the road. In California the situation is governed by the Civil Code[4] which departs somewhat from the prevailing view, as is evidenced by the principal case.[5] An obligation imposed on several persons will be presumed to be joint, and not several, in the absence of express words of severance unless all of the obligors receive some benefit, present or past, from the consideration for which their promise has been given, in which case the obligation will be presumed to be joint and several. This has the effect of making most obligations entered into in California, by more than one person, joint and several.[6] An examination of the authorities in California, which are few in number, causes more or less confusion. The decisions are unimpeachable, but the courts have rendered their opinions with no great degree of clarity. In Harrison v. McCormick[7] it was said: "The rule is well settled that several persons contracting together with the same party for one and the same act shall be regarded as jointly and not as individually or separately liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors." This rule is well settled in other jurisdictions, but not in California. Here the exception to the rule supersedes and becomes itself the rule. Where a promise is made by two or more persons in the singular number it is at common law prima facie a several obligation only, unless the instrument as a whole shows a contrary intent.[8] In California this situation has also been changed by the Civil Code[9] and the promise is presumed to be joint and several.[10]

A. I. D.

CRIMINAL LAW: MISCARRIAGE OF JUSTICE: CONSTITUTIONAL AMENDMENT.—Under section 4½ of Article VI of the California

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[3] (Aug. 30, 1916), 23 Cal. App. Dec. 316, 160 Pac. 578.

[4] Cal. Civ. Code, §§ 1431, 1659.

[5] Supra, n. 3.

[6] Gummer v. Mairs (1903), 140 Cal. 535, 74 Pac. 26; Farmers' Exchange Bank v. Morse (1900), 129 Cal. 239, 61 Pac. 1088; Bell v. Adams (1907), 150 Cal. 772, 90 Pac. 118; Moreing v. Weber (1906), 3 Cal. App. 14, 84 Pac. 220.

[7] (1886), 69 Cal. 616, 11 Pac. 456.

[8] Maiden v. Webster (1868), 30 Ind. 317; Hemmenway v. Stone (1810), 7 Mass. 58, 5 Am. Dec. 27.

[9] Cal. Civ. Code, § 1660.

[10] Bagley v. Cohen (1898), 121 Cal. 604, 53 Pac. 1117; Farmers' Exchange Bank v. Altura Gold M. & Min. Co. (1900), 129 Cal. 263, 61 Pac. 1077.

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Constitution no conviction can be reversed on appeal for any error of pleading or in the conduct of the trial "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." The gist of the provision is found in "miscarriage of justice." This phrase, really that of a layman, has no standing in the legal dictionaries,[1] nor as yet any definite interpretations in the decisions.[2] Five years of construction and application by the courts of this state have not defined it.

It has been said that miscarriage of justice can only mean the conviction of one who is probably innocent.[3] Does that mean that if one is clearly guilty no error nor the infringement of any right of the defendant could warrant a reversal? There must be some constitutional rights which a defendant can insist upon regardless of guilt or innocence, and a jury trial in felony cases is no doubt one of them. However, the infringement of the right not to be compelled to testify against oneself in a criminal action has been held not to demand a reversal as a matter of course.[4] Beyond the mere statement that "it is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure in which the substantial rights belonging to defendants shall be respected,"[5] the cases announce no rule by which such rights can be determined. But where the evidence of guilt is not so conclusive and the error is not one demanding reversal as a matter of course the accepted view is that if the state of the record is such that in the absence of error the jury might reasonably have found for defendant the upper court will reverse, even though there are facts sufficient to support the verdict of guilty.[6] In *People v. Preciado*[7] the jury were erroneously instructed that the defense of insanity must be proved beyond a reasonable doubt instead of by a preponderance of the evidence. On appeal it was held that the record disclosed facts from which, under the rule of preponderance of the evidence the jury might reasonably have found in favor of the theory of insanity, thus warranting a reversal, though the evidence would also support a contrary finding. The test to be applied is the same,

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[1] The only attempted and obviously useless definition of the phrase is in Anderson's Dictionary of Law, that "miscarriage of justice imports a failure or defect in the administration of justice."

[2] The phrase appears in the English Criminal Appeal Act. of 1907, 7 Edw. VII, c. 23, § 4, but no general definition can be drawn from the cases construing it.

[3] Beatty, C. J., in concurring opinion in People v. Fleming (1913), 166 Cal. 357, 136 Pac. 291, Ann. Cas. 1915B, 881.

[4] People v. O'Bryan (1913), 165 Cal. 55, 130 Pac. 1042.

[5] Sloss, J., in People v. O'Bryan (1913), 165 Cal. 55, 65, 130 Pac. 1042. See note on the case, 1 California Law Review, 375.

[6] People v. Converse (1915), 28 Cal. App. 687, 153 Pac. 734; People v. Harlan (1916), 29 Cal. App. 600, 156 Pac. 980.

[7] (Sept. 26, 1916), 23 Cal. App. Dec. 462.

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whether the error is in the admission or rejection of evidence,[8] or in the misconduct of the prosecuting attorney,[9] or of the trial judge.[10]

After all it would seem that the only change resulting from section 4½ is in permitting the appellate courts to review the evidence. It is claimed that the section has done away with the presumption of injury from error.[11] It is true that there were early cases supporting such a presumption,[12] but a proper interpretation of certain parts of the Penal Code[13] led the later cases to demand a showing of injury to a substantial right, so far as this was possible without a review of the record.[14] In civil cases too, under section 475 of the Code of Civil Procedure a showing of substantial injury was necessary.[15] But without the evidence before it the reviewing court could not properly estimate the effect of the error. Under section 4½ a review of the evidence is now required. Therefore those desiring a reversal in criminal cases, and it would seem, also in civil cases, must include the whole record on appeal. Otherwise the court could not say that the part of the record not taken up on appeal would not show the error to be harmless.

In those cases where the court could say that the error did not influence the verdict of the jury section 4½ has and will prevent reversals. But where there is a conflict of evidence and the court cannot say that in the absence of error the jury might not have reached a different result, there will be a reversal in spite of section 4½. A thorough-going restatement of our criminal law and procedure is required, covering the organization of courts, the classification of offenses and offenders, the rules of evidence, the relation of the judge to the jury, and the system of instructions. Adequate institutions for the treatment of offenders are also a necessity.

J. G.

ESTATES OF DECEASED PERSONS: PRESENTATION OF CLAIMS: WHETHER AMENDMENTS ALLOWABLE.—The complaint in an action against an estate, and the claim which was presented and rejected, alleged the failure of the decedent to deliver to plaintiff a certain

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[8] People v. MacPhee (1914), 26 Cal. App. 218, 226, 146 Pac. 522; People v. Converse, supra, n. 6.

[9] People v. Keko (1915), 27 Cal. App. 351, 353, 149 Pac. 1003.

[10] People v. Pitisci (1916), 29 Cal. App. 727, 157 Pac. 502.

[11] People v. Merritt (1912), 18 Cal. App. 58, 122 Pac. 839; People v. O'Bryan, supra, n. 4.

[12] People v. Murphy (1873), 47 Cal. 103; People v. Furtado (1881), 57 Cal. 345; People v. Richards (1902), 136 Cal. 127, 68 Pac. 477.

[13] §§ 960, 1258, 1404.

[14] People v. Brotherton (1874), 47 Cal. 388, 404; People v. Kamaunu (1895), 110 Cal. 609, 612, 42 Pac. 1090; People v. Glaze (1903), 139 Cal. 154, 162, 72 Pac. 965; People v. Creeks (1904), 141 Cal. 527, 533, 75 Pac. 101.

[15] 2 Hayne, New Trial and Appeal, p. 1592, and cases cited.

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number of fruit trees, under a contract therein set forth. On appeal, the contract was interpreted to call for delivery from a specified lot only, and the complaint was held defective in failing to aver that the defendant had the requisite number on hand, or through negligence had failed to keep them on hand. Plaintiff then filed an amended complaint containing the required allegations, but it was held defective, in *Pearson v. Parsons*,[1] as stating a cause of action not included within the claim presented. The time for filing claims having long since expired, and amendment of the claim not being permissible, the plaintiff is wholly without a remedy.

The decision is entirely in harmony with preceding California cases,[2] yet there is obviously a hardship in forever barring a man's cause of action because he has misinterpreted the terms of an involved contract in filing his claim. Three possible remedies present themselves, one available under the law as it now stands, and the others requiring legislative action.

Without doing violence to any statutory provisions, the courts could be much more liberal in allowing variance between the claim and the complaint, in purely technical respects. Immaterial variances are at present overlooked to a greater degree than they would be in a complaint.[3] But a claim is not a pleading. It is merely a means of notifying the administrator of the existence of the demand against the estate. The services of a lawyer should not be necessary in the giving of such a notice. When the claim is rejected, action is brought upon the original demand, not upon the claim itself,[4] and recovery on substantially the same demand of which notice was given should not be barred for the reason that, technically, it is a different cause of action.[5]

The hardship might also be obviated by allowing amendments to claims even after the time for presentation has elapsed. It is well settled that this cannot be done under present California law.[6] The general provisions for amendments would seem in themselves broad enough to cover the case,[7] but they are apparently deemed restricted by the sections which "bar forever" all claims not pre-

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[1] (Sept. 13, 1916), 52 Cal. Dec. 303, 159 Pac. 1173.

[2] Barthe v. Rogers (1899), 127 Cal. 52, 59 Pac. 310; Etchas v. Orena (1900), 127 Cal. 588, 60 Pac. 45; Morehouse v. Morehouse (1903), 140 Cal. 88, 73 Pac. 738; Bechtel v. Chase (1909), 156 Cal. 707, 106 Pac. 81.

[3] Pollitz v. Wickersham (1907), 150 Cal. 238, 88 Pac. 911; Western States Life Ins. Co. v. Lockwood (1913), 166 Cal. 185, 135 Pac. 496.

[4] Gallagher v. McGraw (1901), 132 Cal. 601, 64 Pac. 1080.

[5] Carter v. Pierce (1904), 114 Ill. App. 589; Taber v. Zehner (1911), 47 Ind. App. 165, 93 N. E. 1035.

[6] Estate of Sullenberger (1887), 72 Cal. 549, 14 Pac. 513; In re Turner's Estate (1900), 128 Cal. 388, 60 Pac. 967.

[7] Cal. Code Civ. Proc., §§ 469, 470, 473. See Belleville Sav. Bank v. Bornman (Ill., 1886, 1887), 7 N. E. 686, 10 N. E. 552, for construction of a liberal general amendment statute.

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sented within the required period after notice.[8] A code provision expressly authorizing such amendments may be advisable, with proper limitations.

A still more liberal remedy, which would relieve other and different cases of hardship, as well as the one under discussion, would be a provision allowing entirely new, as well as amended claims to be filed at any time before the decree of distribution, at the discretion of the court, upon a showing of fraud, accident, mistake, or other equitable circumstances excusing the failure to present within the statutory period. The code now allows such late filing in the case of a claimant who had no notice by reason of being out of the state,[9] and that exception might well be extended to other cases equally deserving.

The code amendments suggested are in operation in a number of other states,[10] and although they exist in connection with probate systems differing more or less widely from the California system, it would seem that either could in substance be applied to the latter without serious inconvenience.

O. C. P.

MUNICIPAL CORPORATIONS: MUNICIPAL AFFAIRS.—"Most of the larger cities in the United States are at the present time not only organizations for the satisfaction of local needs, but also agents of the central government of the State, and are entrusted with the exercise of powers affecting not only the inhabitants of the local districts of which they have jurisdiction, but also the inhabitants of the whole state."[1] Legislatures have not distinguished so clearly as they should have done between these two functions, and have often forgotten that municipal corporations have a sphere of local action in which they should move freely and, in a large degree, uncontrolled. Thus, prior to 1896, the California legislature did not scruple to exercise control over all municipal actions, local as well as general.[2] The home-rule regime of municipal government was definitely established in California by the constitutional amendment of 1896.[3] While the amendment served

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[8] Cal. Code Civ. Proc., §§ 1493, 1498, 1500, 1502.

[9] Cal. Code Civ. Proc., § 1493.

[10] Provisions allowing amendments: Appeal of Merwin (1899), 72 Conn. 167, 43 Atl. 1055; Chariton Nat. Bank. v. Whicher (1914), 163 Iowa, 571, 145 N. W. 299.

Provisions allowing late presentation under special circumstances: Brewster v. Kendrick (1864), 17 Iowa 479; Massachusetts Mut. L. Ins. Co. v. Elliot (1877), 24 Minn. 134; Cutting v. Ellis (1894), 67 Vt. 70, 30 Atl. 688.

[1] Goodnow, Municipal Home Rule, 18.

[2] Thomason v. Ashworth (1887), 73 Cal. 73, 14 Pac. 615; People v. Henshaw (1888), 76 Cal. 436, 18 Pac. 413; Davies v. City of Los Angeles (1890), 86 Cal. 37, 24 Pac. 771.

[3] Cal. Const, Art. XI, § 6.

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to free municipalities of certain classes[4] from legislative control in municipal affairs, it afforded no aid in drawing the line between the two municipal functions. In fact it seems now to be conceded that it is impossible to attain a test that will fit all cases,[5] though an early case endeavored to do so.[6] The courts have, therefore, refused to bind themselxes to any set definition, but by regarding each case as presenting the concrete question whether "the matter at issue was or was not within the scope of municipal functions" have nevertheless been able to discriminate discerningly between local and state affairs.[7]

It is not too much to say, however, that recent decisions show a welcome tendency to construe liberally, and thus save to municipalities the control desirable.[8] A unanimous court in *Loop Lumber Company v. Van Loben Sels and American Surety Company of New York*,[9] speaking through Mr. Chief Justice Angellotti, held that since the San Francisco charter provided a complete scheme for governing public works, it controlled in the matter of a bond to secure a contract to do public work, over a state law requiring such a bond equal to fifty per cent of the contract price, though the charter said nothing at all as to the amount. The total impression given by the cases is that, although no fixed definition can be found, the field of municipal affairs is at least so well ascertained that no hesitation should be felt in leaving to the court the question as to what is a municipal affair, a result that would necessarily follow if the lengthy and not all comprehensive enumerations in charters were abolished and made to give way to a single clause in the charter to the effect merely that the municipality was hereby granted full control in municipal affairs.[10]

It was to attain this result that the amendment of 1914 to section 6 of Article XI was passed. The efficacy of the amendment in this respect has as yet not been squarely determined. The liberal bent taken by the court in the recent cases, however, affords basis for the hope that the amendment will be given the desired construction. It cannot really be said that dicta in the principal case and another, more recent,[11] declaring that the changed word-

[4] Dawson v. Superior Court (1910), 13 Cal. App. 582, 110 Pac. 479. The classes thus freed comprised those cities organized by special legislative charter prior to the adoption of the Constitution of 1879, and cities operating under freeholder's charters under that Constitution.

[5] Sunset Tel. & Tel. Co. v. Pasadena (1911), 161 Cal. 265, 118 Pac. 796; Dillon, Municipal Corporations, § 165.

[6] Fragley v. Phelan (1899), 126 Cal. 383, 58 Pac. 923.

[7] The cases group themselves mainly under taxation, use of public money and property, and the exercise of purely administrative functions of the city.

[8] Matter of Application of Westenberg (1914), 167 Cal. 309, 139 Pac. 674; Stern v. City Council of Berkeley (1914), 25 Cal. App. 685, 145 Pac. 167; Scheafer v. Herman (1916), 51 Cal. Dec. 406, 155 Pac. 1084.

[9] (July 28, 1916), 52 Cal. Dec. 223, 159 Pac. 600.

[10] 1 California Law Review, 132, 145.

[11] Los Angeles v. Central Trust Co. of New York (Sept. 11, 1916), 52 Cal. Dec. 298.

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ing of section 6, does not change its effect, are indicative of a contrary construction. In both, the court explains its meaning to be that city charters are still paramount to general laws with respect to municipal affairs, a proposition that would be none the less true though the desired construction were given the section.

W. A. S.

MUNICIPAL CORPORATIONS: RIGHTS OF A LICENSEE.—What are the rights of a licensee who builds a cellar under the street as against a contractor who is repairing the street under a contract with the city? In the case of *Norton v. Ransome-Crummey Company*,[1] it was held that where the contractor performed his work properly and without negligence the licensee could not recover for damages to his cellar which he suffered by reason of the curbings being torn up at the time a rainstorm occurred.

It is unquestioned that the municipality had the right to contract for the repair and improvement of the street. In effecting these improvements, neither the city nor the contractor are, as a general rule responsible for consequential damages inflicted upon the property of the adjacent owner.[2] In California, before the adoption of the constitution of 1879, decisions followed this rule.[3] But this constitution, with its provision that compensation must be made for the taking or damaging of private property for public use,[4] may be considered to have changed this, until it appears safe to say that damages, caused by improving the highway, to an adjacent owner's undoubted property must be compensated for.[5]

But has the licensee under the city any such property right as to entitle him to such compensation? A licensee can exercise no right inconsistent with the use of the street as a public highway.[6] The proper repair of the street is within the range of such use. Therefore, it is clear that the licensee could not build his cellar in such a manner as to interfere with the proper repair and improvement of the street. The license granted to him is really a right to construct a cellar in such a manner as not to infringe the use or non-negligent repair of the street. In granting this license,

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[1] (Sept. 20, 1916), 52 Cal. Dec. 312, 159 Pac. 1177.

[2] Callender v. March (1823), 1 Pick. (Mass.) 417; Transportation Co. v. Chicago (1878), 99 U. S. 635, 25 L. Ed. 336; 4 Dillon, Municipal Corporations (5th ed.), 2921.

[3] Shaw v. Crocker (1871), 42 Cal. 435; Reardon v. San Francisco (1885), 66 Cal. 492, 6 Pac. 317, 56 Am. Rep. 109.

[4] Cal. Const., Art I, § 14.

[5] Reardon v. San Francisco, supra, n. 3; Duncan v. Ramish (1904), 142 Cal. 686, 76 Pac. 661; Eachus v. Los Angeles etc. Ry. Co. (1894), 103 Cal. 614, 37 Pac. 750, 42 Am. St. Rep. 149; Stanford v. San Francisco (1896), 111 Cal. 198, 43 Pac. 605; Durgin v. Neal (1890), 82 Cal. 595, 23 Pac. 133.

[6] Nelson v. Godfrey (1850), 12 Ill. 22; Winter v. City Council of Montgomery (1887), 83 Ala. 589, 3 So. 235; 3 Dillon, Municipal Corporations, (5th ed.), 1870-1871.

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there would seem to be a condition implied to this effect from the nature of the case. Consequently, the licensee must understand that his license cannot be made use of in such a manner as to hinder or inconvenience the city in its proper duties. To compel the city, or a contractor working under it, to make compensation for injury inflicted upon the licensee without negligence would be such an inconvenience or hindrance. There would seem then, to be a duty cast upon the licensee so to construct his cellar as to guard against the injury, if one of non-negligent repair, and in the event of his failure to do so, no liability for resulting damages could be charged against the city or contractor.

In the principal case, the court implies that had there been negligence on the part of the contractor, he would have been liable. But whether this implication proceeds upon the assumption that the licensee can maintain his action for the negligent interference with his right to have the cellar, or that the goods stored in the cellar were negligently destroyed, is not clear. The rule seems to be, that where a bare license is interfered with, the licensee cannot recover for interference with his exercise thereof by a third person.[7] But recovery appears to be allowed in the later cases where there is also involved possession by the licensee of property on the premises, in pursuance of the license;[8] a fortiori, where the licensee, in addition to such possession, has made investments relying upon the license. The present case in effect fits into this last situation. Although this question has not been expressly adjudicated in California, it has been held that a license acted upon becomes in all essentials an easement upon the licensor's land.[9] While it may be doubted whether a license, even if investments are made relying upon it, can become an easement, the courts seem to recognize the existence of a property right which may be protected against the negligence of a third party. But where no negligence exists, the license would seem to be subject to the implied condition that the city has a higher right, and no recovery for consequential damages can be had.

J. L. K.

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[7] Hill v. Tupper (1863), 2 Hurl. & C. 121; Laing v. Whaley (1858), 2 Hurl. & N. 476, 3 Hurl. & N. 675; Ottowa Gas-Light etc. Co. v. Thompson (1869), 39 Ill. 598.

[8] Miller v. Inhabitants of Greenwich (1899), 42 Atl. 735, 62 N. J. Law 771; Case v. Weber (1850), 2 Ind. 108; Paul v. Hazelton (1874), 36 N. J. Law 106; 13 Harvard Law Review, 151; 1 Tiffany, Modern Law of Real Property, 679, note.

[9] Stoner v. Zucker (1906), 148 Cal. 516, 83 Pac. 808. 113 Am. St. Rep. 301, 7 Ann. Cas. 704; Imperial Water Co. v. Wores (1915), 29 Cal. App. 253, 155 Pac. 124; Flickenger v. Shaw (1890), 87 Cal. 126, 25 Pac. 268, 22 Am. St. Rep. 234, 11 L. R. A. 134; Smith v. Green (1895), 109 Cal. 228, 41 Pac. 1022. See also 4 California Law Review, 344. Contra: Lawrence v. Springer (1892), 49 N. J. Eq. 289, 24 Atl. 933, 31 Am. St. Rep. 702; Pifer v. Brown (1897), 43 W. Va. 412, 27 S. E. 399, 49 L. R. A. 497; Jones v. Stover (1906), 131 Ia. 119, 108 N. W. 112, 6 L. R. A. (N. S.) 154.

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PLEADING: JOINDER OF INCONSISTENT COUNTS FOR SINGLE CAUSE OF ACTION.—In states which have adopted the reformed system of procedure there is uniformly a provision that the complaint shall state the cause of action in ordinary and concise language. It was thought that this provision would do away with the use of the common counts, but, as noted in a previous number of this Review, the only effect in California was to strip the common counts of some of their fictitious allegations.[1] It was also thought that this section would do away with the practice of charging in various and usually inconsistent counts for a single cause of action.[2] Under the common law, this practice was prevalent, and to a large degree necessary, in order to remove the possibility of a variance. Since the complaint under the reformed systems of procedure need only state the ultimate facts upon which the plaintiff relies for his relief, and since variances can easily be remedied through amendments, it would seem that in theory the necessity for using several counts has wholly disappeared.

The indiscriminate use of different counts for a single cause of action is not permitted by some of the so-called code states.[3] The plaintiffs in such states will be required to elect upon which count he will proceed. It has, however, been held that where it becomes advisable for the plaintiff to proceed along inconsistent theories, as where the facts are not known, or are peculiarly within the knowledge of the defendant, he may properly proceed against the defendant in inconsistent counts, though admittedly he has but a single cause of action.[4]

As yet there has been no distinct adjudication in California that inconsistent counts may be used in all situations. Their use has of course been allowed where the facts were peculiarly within the knowledge of the defendant.[5] It has also been allowed where the plaintiff was reasonably in doubt as to his safety in proceeding by means of any one count because the facts as a whole were unknown to either party, and it was considered desirable to let the

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[1] 4 California Law Review, 352.

[2] "If the plaintiff have different causes of action he may of course, and should set them forth, but he should not set forth the same cause of action in different forms." Manual of Code Procedure by David Dudley Field, reprinted in Fairall's Cal. Code Civ. Proc. p. 333.

[3] Matz v. Chicago & A. R. Co. (1898), 88 Fed. 770, "such pleading makes chance medley instead of a plain and concise statement of the facts constituting the cause of action required by the (Missouri) Code;" Reed v. Poindexter (1895), 16 Mont. 294, 40 Pac. 596; Harvey v. S. P. Co. (1905), 46 Ore. 505, 80 Pac. 1061; Sturges v. Burton (1858), 8 Oh. St. 215, 72 Am. Dec. 582, and note. See generally, Bliss, Code Pleading (3rd. ed.) § 119; Pomeroy, Code Pleading, § 467.

[4] Willard v. Carrigan (1902), 8 Ariz. 70, 68 Pac. 538; Vindicator etc. Co. v. Firstbrook (1906), 36 Colo. 498, 86 Pac. 313; 10 Ann. Cas. 1109; Spotswood v. Morris (1904), 10 Idaho, 129, 77 Pac. 216; Jones v. Palmer (1855), 1 Abb. Pr. 442; Whitney v. Chicago & N. W. Ry. Co. (1870), 27 Wis. 327.

[5] Rucker v. Hall (1895), 105 Cal. 425, 38 Pac. 962.

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plaintiff avail himself of whatever the evidence produced at the trial might show,[6] or because he was uncertain as to the precise nature of his right under the circumstances.[7] It has also been allowed even where the facts were apparently known to the plaintiff, in cases where one count in effect included another, as where a count on an express contract was coupled with one on an implied contract.[8]

Intimations have been thrown out that the use of inconsistent counts would be permitted in any situation,[9] the most recent and the strongest of which is in the case of *Tanforan v. Tanforan*[10] in which the plaintiff was forced to elect after he had presented his evidence and on his appeal from the judgment, attacked the order compelling the election. The appellant did not prevail because no injury could be shown on account of the fact that the evidence offered would not have supported the count which was rejected. In disposing of the case, however, the court declared that the order enforcing the election was erroneous, and that inconsistent counts could be used "when for any reason the pleader thinks it desirable so to do."

The tendency of the California courts to allow the use of inconsistent counts is perhaps most forcibly shown by the fact that the defendant has no effective means of attacking them. Such a complaint is good against general demurrer,[11] and against special demurrer,[12] for it cannot be shown that a particular count is uncertain by reference to another count. The plaintiff cannot be compelled to elect before the trial upon which count he will proceed[13] because as noted above, he may at that time be in doubt as to his rights in the matter; nor can he under the Tanforan case be forced to elect upon which count he relies after his evidence is in, for he cannot be asked to hazard a guess as to which case he has made out, this being a matter for the jury or for the judge on a motion for a nonsuit on any of the counts.[14]

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[6] Froeming v. Stockton R. R. Co. (1915), 171 Cal. 401, 153 Pac. 712.

[7] Van Lue v. Wahrlich-Cornett Co. (1910), 12 Cal. App. 749, 114 Pac. 411.

[8] Wilson v. Smith (1882), 61 Cal. 209; Cowan v. Abbot (1891), 92 Cal. 100, 28 Pac. 213; Estrella Vineyard Co. v. Butler (1899), 125 Cal. 232, 57 Pac. 980; Remy v. Olds (1893), 4 Cal. Unrep. Cas. 240, 34 Pac. 216.

[9] Stockton Combined Harvester etc. Co. v. Glens Falls Ins. Co. (1898), 121 Cal. 167, 171, 53 Pac. 565, "Besides we see no reason why a cause of action arising out of the same transaction may not be separately stated in different ways, even though they are inconsistent with each other. The defendant is permitted to plead inconsistent defenses, and there can be no good reason why the same rule should not apply to different counts of a complaint as well as to the answer." Cowan v. Abbot, supra, n. 8, "Theoretically there are distinct causes of action, and there is no requirement that they shall correspond to, or be consistent with each other."

[10] (Aug. 8, 1916), 52 Cal. Dec. 251, 158 Pac. 709.

[11] Murphy v. Crowley (1903), 140 Cal. 141, 73 Pac. 820.

[12] Stockton Combined Harvester etc. Co. v. Glens Falls Ins. Co., supra, n. 9.

[13] Wilson v. Smith, supra, n. 8; Estrella Vineyard Co. v. Butler, supra, n. 8; Remy v. Olds, supra, n. 8.

[14] See also Van Lue v. Wahrlich-Cornett Co., supra, n. 7.

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Convenient as the use of inconsistent counts may be in some situations, it must be recognized that their use is not in accordance with the spirit of the reformed procedure. Moreover it would seem that their indiscriminate use might in many cases impose an unnecessary burden upon the defendant. This burden, however, becomes more apparent than real, if, as suggested by the principal case, he may at the conclusion of the plaintiff's case move for a nonsuit on any count not adequately supported by the evidence presented. Given this right on the part of the defendant, there seems no forcible reason to deny the use of inconsistent counts in all situations, especially since the defendant always has the privilege of pleading inconsistent defenses.[15]

M. W.

PUBLIC SERVICE COMPANIES: POWER OF COMMISSION TO COMPEL CONSTRUCTION OF BRANCH LINES.—Is a railroad company's dedication of property to public use limited to the territory immediately traversed by its rails, or does it extend to outlying areas which cannot be directly served except by means of additional lines? And has power been conferred upon the Railroad Commission to compel the construction of additional lines and afford service in a new field under the California Public Utilities Act, which purports to give the Commission power to compel a public utility to make "additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility . . . . to promote the security or convenience of its employees or the public?"[1] In *Atchison, Topeka & Santa Fe Railway Company v. Railroad Commission of the State of California,*[2] the Supreme Court of California holds that the obligations of a railroad company do not extend beyond the field of original dedication and that an order compelling the construction of an additional line constitutes a taking of property and is beyond the Commission's powers. The Commission's order in Cabrillo Club v. Atchison, Topeka & Santa Fe Railway Company[3] is annulled.

The complainants before the Commission sought the restoration of a line of railroad from Oceanside to Temecula, a portion of which, approximately twelve miles in length extending from Fallbrook to Temecula, had been abandoned for more than twenty years. Such an abandonment with the consent of the state works a forfeiture of all rights and necessarily destroys correlative obligations.[4] Accordingly, upon the facts of the case, the issue is

[15] Bell v. Brown (1863), 22 Cal. 671; Banta v. Siller (1898), 121 Cal. 414, 53 Pac. 935; Eppinger v. Kendrick (1896), 114 Cal. 620, 46 Pac. 613.

[1] Public Utilities Act, § 36, Cal. Stats. 1915, pp. 115, 134.
[2] (Oct. 23, 1916), 52 Cal. Dec. 485, 160 Pac. 828.
[3] (1915), 8 Cal. Rr. Comm. 74.
[4] Home Real Estate Co. v. Los Angeles Pacific Co. (1912), 163 Cal. 710, 126 Pac. 972; Public Ser. Comm. v. Philadelphia, B. & W. Rr. Co. (1914), 122 Md. 438, 89 Atl. 726.

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clearly presented as to the power of the Commission to compel the construction of a new branch line. The Commission's assertion of this authority was rested upon the provisions of Section 36 of the California Public Utilities Act.

The validity of the power which the Commission sought to exercise turns upon the scope of the railroad company's dedication to public use. Within the field of dedication, the regulative authority has ample freedom of action. Improved train service may be required,[5] as may switching connections between railroads.[6] A passenger station may be ordered built,[7] or even double tracks along a street already occupied by a single track may be required to be constructed.[8] Requirements of this character represent a legitimate exercise of the police power. Of a totally different character, however, is an order compelling extension and service in a field not embraced within the limits of original dedication. A railroad corporation does not, by virtue of its public undertaking, forfeit control over the limits of its enterprise; it may still determine the essential scope of its operations. Although orders to extend their mains and lines have been given to water, gas, and telephone companies, such extensions have only been ordered within a certain district to which service was already tendered, such as a city, and no extension can be ordered to a new territory beyond that offered to be served.[9]

The error of the Commission consists in the assumption that the power to regulate within the field of the tender of service comprehends authority to compel extensions in a distinct field not covered by the original dedication to public use. A similar error on the part of the Commission was corrected by the Supreme Court in Del Mar Water Company v. Eshleman.[10]

J. L. K.

STATUTORY CONSTRUCTION: REPEAL BY IMPLICATION.—The Code of Civil Procedure gives a right of action generally to the representatives of any person, not a minor, whose death has been caused by the wrongful act or neglect of another.[1] This section, however, can apply only where the decedent would himself have had a right of action for the injury, so that until 1907 an employer

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[5] Mo. Pac. Rr. Co. v. Kansas (1910), 216 U. S. 262, 54 L. Ed. 472, 30 Sup. Ct. Rep. 330.

[6] Wisconsin, Minn. & Pac. Rr. v. Jacobson (1900), 179 U. S. 287, 45 L. Ed. 194, 21 Sup. Ct. Rep. 115.

[7] Minneapolis & St. Louis Rr. Co. v. Minn. (1904), 193 U. S. 53, 48 L. Ed. 614, 24 Sup. Ct. Rep. 396.

[8] Phoenix Ry. Co. v. Geary (1915), 239 U. S. 277, 36 Sup. Ct. Rep. 45.

[9] 1 Wyman, Public Service Corporations, p. 672; Lukrawka v. Spring Valley Water Co. (1915), 169 Cal. 318, 146 Pac. 640; Crouch v. Arnett (1905), 71 Kan. 49, 79 Pac. 1086; Del Mar Water Co. v. Eshleman (1914), 167 Cal. 666, 140 Pac. 591.

[10] Supra, n. 9.

[1] Cal. Code Civ. Proc., § 377.

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was not liable for the death of an employee where he might avail himself of the defense of assumption of risk or of the fellow servant rule.[2] In that year section 1970 of the Civil Code was amended so as to deprive the employer of these defenses in certain specified cases, and to provide that "when death . . . . results from an injury to an employee received as aforesaid, the personal representative of such employee . . . . may recover damages . . . . on behalf of the widow, children, dependent parents, or dependent brothers and sisters, in the order of precedence named," thus restricting recovery to dependents. In *Gonsalves v. Petaluma and Santa Rosa Railway Company*[3] the Supreme Court held that this amendment is conclusive only in cases in which the employee's right of action is created by it, and that in such actions by the representatives of employees as were maintainable before the amendment was passed, the general provisions of the Code of Civil Procedure are still in force, so that in those actions a recovery may be had on behalf of parents without showing dependence.

The contention that section 1970 had abrogated the earlier section in all suits brought by the representatives of employees seems to have been based upon the theory that a special law will prevail over a general law treating the same matter;[4] but the application of this principle must plainly be subject to the broader rules that "legislative intention is the first principle of statutory construction,"[5] and that the legislature will not be presumed to have intended a repeal where none is expressed, unless the provisions of two acts cannot be reasonably construed together without repugnance.[6] It is apparently upon this ground, supported by similar decisions in other jurisdictions,[7] that the court held that section 1970 should be construed with and not as superseding the general provision of the Code of Civil Procedure. The court says, "There is no language in our law which prompts, much less which forces the view that the legislature thus designed to restrict this right of

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[2] See Cal. Civ. Code, § 1970, as it stood before 1907.

[3] (Aug. 5, 1916), 52 Cal. Dec. 247, 159 Pac. 724.

[4] See the decision of the principal case in the District Court of Appeal (Nov. 5, 1915), 21 Cal. App. Dec. 640.

[5] Daniels v. State (1898), 150 Ind. 348, 50 N. E. 74; Sutherland, Statutory Construction, § 276 et seq.

[6] Daniels v. State (1898), 150 Ind. 348, 50 N. E. 74; Lawrence v. Town of Mansfield (1911), 129 La. 672, 56 So. 633; Pattinson v. Flayer (1909), 158 Mich. 56, 122 N. W. 215; State v. Cosgrave (1909), 85 Neb. 187, 122 N. W. 885; McGavisk v. R. R. Co. (1869), 34 N. J. Law 509; Davis v. Knights of Honor (1900), 165 N. Y. 159, 58 N. E. 891; State v. County Court (1909), 54 Ore. 255, 101 Pac. 907; Isham v. Bennington Iron Co. (1847), 19 Vt. 230; Hartig v. City of Seattle (1909), 53 Wash. 432, 102 Pac. 408; Sutherland, Statutory Construction, § 275 et seq.

[7] Colorado Milling and Elev. Co. v. Mitchell (1899), 26 Colo. 284, 58 Pac. 28; Gohen v. Texas Pac. Ry. (1876), Fed. Cas. 5506; Chiara v. Stewart Mining Co. (1913), 24 Idaho 473, 135 Pac. 245; Payne v. N. Y. etc. R. Co. (1911), 201 N. Y. 436, 95 N. E. 19; Staats v. Twohy Bros. Co. (1912), 61 Ore. 602, 123 Pac. 909; St. Germain v. Potlatch (1913), 76 Wash. 102, 135 Pac. 804.

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action (that given by the Code of Civil Procedure) in cases where the death of an employee had been negligently caused;" that is, in cases where the right existed before section 1970 was amended. It would seem that the court might have gone further and found language which explicitly negatives the existence of such a design, for the application of the amendment is by its terms expressly limited to cases in which "death results from an injury to an employee received as aforesaid." This phrase "received as aforesaid" seems to indicate that the legislature was simply providing a remedy in those causes of action which it had just created in the first part of the enactment.

C. A. R.

TORTS: SPITE FENCE.—There is much divergence of judicial opinion as to the liability of the owner of land for using it, not for any benefit to himself, but purely to the detriment of his neighbor. Some states hold that an owner may erect on his land, near the boundary, an abnormally high fence, not for any advantage of his own, but merely to darken his neighbors' windows or to obstruct the view.[1] The courts which deny compensation for the damage inflicted by spite fences proceed upon the assumption that the owner of land, by virtue of his ownership, has an absolute right to erect such a fence. As Ames points out,[2] "If, in truth, the owner's right is absolute in this respect, how can it be taken away from him by statute?

The immunity from liability for maintaining spite fences probably exists in England. "No use of property which would be legal if due to a proper motive can become illegal because it is prompted by a motive which is improper or even malicious."[3] On the other hand in France and Germany the owner is liable in tort.[4]

In the United States an opinion by Mr. Justice Morse[5] marks the beginning of the trend of authority away from the traditional view and holds that if an owner makes such an obstruction as a fence with the intention of injuring his neighbor, and without any advantage or benefit to himself, it is a nuisance for which his neighbor has a right of action. While Justice Morse's opinion was not concurred in by a majority of the court it has been followed since in Michigan.[6] A number of jurisdictions now hold that an adjoining landowner may sue for damages caused by, or may enjoin the erection or maintenance of a spite fence erected for the

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[1] Russell v. State (1904), 32 Ind. App. 243, 69 N. E. 482; Bordeau v. Greene (1899), 22 Mont. 254, 56 Pac. 218; Brostrom v. Lauppe (1901), 179 Mass. 315, 60 N. E. 785; Mahan v. Brown (1835), 13 Wend. 261.

[2] Tort Because of Wrongful Motive, 18 Harvard Law Review, 411, 415, n.

[3] Mayor v. Pickles [1895] App. Cas. 587.

[4] 18 Harvard Law Review, 414.

[5] Burke v. Smith (1888), 69 Mich. 380, 37 N. W. 838.

[6] Peck v. Roe (1896), 110 Mich. 52, 67 N. W. 1080; Flaherty v. Moran (1890), 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183.

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sole purpose of injuring him in the lawful and beneficial use of his property.[7]

An Oklahoma case, *Hibbard v. Halliday*,[8] accords with this modern view. The court says that property in land must be considered for many purposes, not as an absolute, unrestricted dominion, but as an aggregation of qualified privileges. The right to use one's own property for the sole purpose of maliciously injuring another is not one of the immediate and indestructible rights of ownership.

In California the matter is regulated by statute. An Act of 1885 prohibited the erection of any fence or partition wall exceeding ten feet in height, without a permit from the board of supervisors or city council of the city or town, and also provided that the consent of the adjoining owner should be obtained before such permit is granted.[9] No mention is made of malice, but in 1913 an Act was passed remedying this defect. This provided that "Any fence or other structure in the nature of a fence, unnecessarily exceeding ten feet in height, maliciously erected or maintained for the purpose of annoying the owner or occupants of adjoining property, shall be deemed a private nuisance.[10]

Similar statutes have been enacted in various jurisdictions,[11] and such statutes have been held to be within the limits of the police power[12] and constitutional.[13] In order to bring an obnoxious fence within the provisions of such a statute, and to avoid constitutional objections, the malicious intent must be so predominate as to give character to the fence, and it must be manifest that its real usefulness will be clearly subordinate and incidental.[14]

F. H. W.

TORTS: VENDOR'S LIABILITY TO SUB-VENDEE: PROXIMATE CAUSE.—An oil company sold cans of mixed kerosene and gasoline to a grocer. Should the oil company be liable to one who purchased the mixture from the grocer and was injured by the explo-

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[7] Barger v. Barringer (1909), 151 N. C. 433, 435; 66 S. E. 439, 25 L. R. A. (N. S.) 831, n., 19 Ann. Cas. 472, n.; Norton v. Randolph (1912), 176 Ala. 381, 58 So. 283, Ann. Cas. 1915-A, 714, 40 L. R. A. (N. S.) 129; Kirkwood v. Finegan (1893), 95 Mich. 543, 55 N. W. 457; Smith v. Speed (1901), 11 Okl. 95, 66 Pac. 511; Haverstick v. Sipe (1859), 33 Pa. St. 368.

[8] (Oklahoma, June 13, 1916), 158 Pac. 1158.

[9] Held constitutional in Western Granite & Marble Co. v. Knickerbocker (1894), 103 Cal. 111, 37 Pac. 192.

[10] Cal. Stats. 1913, p. 342.

[11] Ky., Me., Mass., N. H., Vt., and Wash.

[12] Horan v. Burnes (1903), 72 N. H. 93, 54 Atl. 945, 101 Am. St. Rep. 670, 62 L. R. A. 602.

[13] Rideout v. Knox (1889), 148 Mass. 368, 19 N. E. 390, 12 Am. St. Rep.. 560, 2 L. R. A. 81. Such a statute was held unconstitutional in Huber v. Merkel (1903), 117 Wis. 355, 94 N. W. 354; Karasek v. Peier (1900), 22 Wash. 419, 61 Pac. 33, 50 L. R. A. 345.

[14] Supra, n. 13.

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sion of the gasoline in a kerosene lamp? The case of *Catlin v. Union Oil Company*[1] holds that the oil company is not liable because the grocer discovered the mistake and continued to sell from the stock, after testing and putting aside the cans of mixed gasoline and kerosene.

The court assumes that the vendor is liable for such a mistake to the sub-vendee, in the absence of negligence on the part of the vendee. This is a tort liability, arising from a manufacturer's implied warranty of an article that is inherently dangerous to human life. The first important case[2] following this rule applied it to the sale of poison, labelled as a harmless drug. Naphtha,[3] low grade petroleum,[4] mixtures of oil and gasoline,[5] gasoline sold for kerosene,[6] have all been held inherently dangerous. Some of the courts would require knowledge of the defect by a vendor[7] but these courts are in a decided minority. The California case does not consider the question of guilty knowledge and holds that the vendor would be liable under ordinary circumstances. This is consistent with the reasoning in an earlier case[8] on the vendor's liability to a subvendee and would appear to be in line with the better authority.

The decision is based on the ground that the act of the grocer in continuing to sell from the stock, even though he had tested the cans was an intervening act which released the oil company from liability and was the proximate cause of the accident. It would seem that not enough attention was given to the principle that one injured by concurrent acts of independent tort-feasors may recover from either. Their acts may not coincide in time and may differ in character and still be held concurrent. The Supreme Court of California recently gave a lengthy and well-considered opinion[9] on the question of proximate cause. In that case, a gas company had failed to repair leaky gas-mains for some hours after notification. A restaurant keeper lighted a fire in a room filled with gas and the plaintiff was seriously injured by the explosion. He was allowed a right of action against the restaurant keeper and the gas company or either. This case agrees with a much earlier case[10] in California in holding that acts which differ in character and do not coincide in time may be held concurrent elements in constituting the proximate cause.

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[1] (Oct. 2, 1916), 23 Cal. App. Dec. 519.
[2] Thomas v. Winchester (1852), 6 N. Y. 397.
[3] Wellington v. Downer Kerosene Oil Co. (1870), 104 Mass. 64.
[4] Elkins, Bly & Co. v. McKean (1875), 79 Pa. St. Rep. 493.
[5] Standard Oil Co. v. Parrish (1906), 145 Fed. 829.
[6] Ellis v. Republic Oil Co. (1906), 133 Iowa 11, 110 N. W. 20.
[7] Elkins, Bly & Co.. v. McKean, supra, n. 4.
[8] Lewis v. Terry (1896), 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146.
[9] Merrill v. Los Angeles Gas & Elec. Co. (1910), 158 Cal. 499, 111 Pac. 534, 31 L. R. A. (N. S.) 559, 139 Am. St. Rep. 134.
[10] Pastene v. Adams (1874), 49 Cal. 87.

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There are few cases in which the retailer of a dangerous commodity sold it with a knowledge of its danger. Chief Justice White has suggested that even though a retailer sells gasoline mixed with kerosene with knowledge of the danger, the negligent manufacturer might still be held liable.[11] In the case of Clement v. Crosby,[12] a retailer sold inflammable stove-polish with full knowledge of its dangerous character. The manufacturer and the retailer were later held liable as joint tort-feasors for the accident resulting from the explosion of the stove-polish. In view of these decisions and of the general trend of the law, it would appear that a contrary opinion might have been given in the principal case.

E. B. P.

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[11] Waters-Pierce Oil Co. v. Deselms (1908), 212 U. S. 159, 53 L. Ed. 453, 29 Sup. Ct. Rep. 270.

[12] (1907), 148 Mich. 293, 111 N. W. 745.

Book Reviews

THE ACT TO REGULATE COMMERCE CONSTRUED BY THE SUPREME COURT. By Hubert Bruce Fuller. John Byrne & Company, Washington, D. C. 1915. pp. x, 585. $6.00.

The bibliography of the Act to Regulate Commerce has become so extended that the field has seemed completely occupied, if not overcrowded. But Mr. H. B. Fuller of the Cleveland, Ohio, Bar has found a gap in the book shelf and has undertaken to supply it with a treatise on the Act as "construed by the Supreme Court." As the title implies, the decisions of the lower Federal courts and the rulings of the Interstate Commerce Commission are alike disregarded, the treatise being predicated solely upon the expressions of the one tribunal from whose decisions there is no appeal. The result is a text book of singular authority.

A preliminary chapter is devoted to the commerce clause of the Constitution. This review of the constitutional aspects of the law, while necessarily brief, is scholarly and comprehensive. It is matter for comment that so much of merit could have been crowded within the limits of fifty-three pages. The chapter constitutes an effective introduction to the first section of the Act to Regulate Commerce.

The order of treatment in the main text conforms directly to the division of the Act to Regulate Commerce, a chapter being devoted to each section. The mechanics of the book consequently add greatly to the convenience of the student and the practitioner desiring to ascertain the state of the decisions upon a specific paragraph of the statute. Extended comment upon the text itself will be superfluous, for, in the very nature of things, the writer could hope to do no more than to reflect faithfully the principles established by the court. Suffice it to say that the work has been intel-

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ligently and honestly done, and that it is responsive to a definite need.

A. P. M.

UNIFORM BUSINESS LAW. By Coleman Hall Bush. H. M. Rowe Co., Harlem Square, Baltimore, Md. 1915. pp. x, 465. $1.10 cloth. $1.25 Buckram.

Text books on commercial law may be divided into two classes: first, those which are intentionally confined in their application to a particular jurisdiction, and which are, therefore, unfit for use in any but the field which they are specially designed to cover; and second, those which are of such wide scope as to be useful only as declaratory of general principles, and of little or no value as practical handbooks of business law. Occasionally an effort is made to combine in a single work the desirable features of both classes. Invariably the attempt results in the production of a book which is, at best, unreliable in many respects, and actively misleading in others.

"Uniform Business Law," by Coleman Hall Bush, provides an apt illustration of what has been said with respect to the consequences of attempting too much in the construction of a text book on commercial law. The author's endeavor has been, to use his own words, "to present the widest range of business law consistent with its intelligible statement in limited space." From the point of view of logical arrangement of his subject matter, and clarity of exposition, he has accomplished much, yet the work as a whole is far from satisfactory. In some instances, as for example in his treatment of the subject of bankruptcy (page 96), and again, of the liability of stockholders for corporate debts (page 305), Mr. Bush has given to his topic such incomplete consideration as to leave the reader feeling that it might better have been omitted altogether. In other instances, the effort to gather the law of all jurisdictions upon a particular point into a single statement has resulted in the enunciation of rules which are, to say the least, of doubtful accuracy. As typical of these may be cited the rule which the author lays down (page 190) to the effect that the Statute of Frauds applies to the "sale of any goods or choses in action of the value of *five hundred dollars or upwards.*" Further comment upon these points would serve no worthy purpose. In conclusion it may be remarked that the faults of Mr. Bush's contribution to the bibliography of commercial law should be charged in large part to a seeming disregard of the natural limitations of his opportunity. However ideal might be a system of uniform business law throughout the several states of the Union, such a system does not, as a fact, exist.

J. U. C., Jr.

FRENCH POLICY AND THE AMERICAN ALLIANCE OF 1778. By Edward S. Corwin, Princeton University Press, Princeton, 1916. pp xvi, 430. $2.00 net.

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This scholarly volume dealing with "the one entangling alliance to which the United States has been a party" will be welcomed by every student of American history and diplomacy, for in it he will find an excellent and impartial treatment of a difficult subject.

The author is "particularly interested," as he tells us in his preface, "in emphasizing the idea that France's intervention in the American Revolution was motivated primarily by her desire to recover her lost preeminence on the Continent of Europe," and in pointing out that it was not merely "an episode in the British-French struggle for colonial dominion in the Western Hemisphere."

A second aspect of the subject which is given prominence is "the embarrassment which resulted to France from the conflict of interest between her new ally, America, and her hereditary ally, Spain," a conflict which made it difficult to secure the participation of Spain in the first place, caused France to put a very limited interpretation upon certain provisions of the treaty and finally caused the American commissioners to break their instructions at the negotiations of 1782.

The present work can only add to the author's reputation for careful and constructive scholarship in the field of American political history.

E. E.

Books Received

CASES IN QUASI CONTRACTS. By Edward S. Thurston. American Case Book Series. West Publishing Company, St. Paul, Minn. 1916. pp. vi, 622. $4.00.

CASES ON THE LAW OF PROPERTY. By Ralph W. Aigler. American Case Book Series. West Publishing Company, St. Paul, Minn. 1916. pp. viii, 953. $5.00.

RESCISSION OF CONTRACTS AND CANCELLATION OF WRITTEN INSTRUMENTS. By Henry Campbell Black. Vernon Law Book Co., Kansas City, Mo. 1916. 2 vols. pp. xii, 1779. $15.00.

BANKRUPTCY FORMS. By Marshall S. Hagar and Thomas Alexander. 2nd Ed. Matthew Bender & Co., 109 State St., Albany, N. Y. 1916. pp. 963. $9.00.

THE LAW OF IRRIGATION. By Joseph R. Long. 2nd Ed. The W. H. Courtright Co., Denver, Colo. 1916. pp. xvi, 626.

THE LAW OF WILLS AND THE MANNER OF THEIR DRAFTING, EXECUTION, PROBATE, AND CONTEST. By George W. Thompson. The Bobbs-Merrill Co., Indianapolis, Ind. 1916. pp. xxxii, 1039. $7.50.

THE LAW: BUSINESS OR PROFESSION? By Julius Henry Cohen. The Banks Law Publishing Co., 23 Park Place, New York, N. Y. 1916. pp. xxv, 415. $2.50.

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California Law Review

Volume V FEBRUARY, 1917 Number 3

Undisclosed Principal in California

ABOUT thirty cases have arisen in this state, in which the courts have consciously applied the peculiar doctrines that have developed in regard to the rights and liabilities of agent, principal, and third party, when the agent makes a contract with the third party without disclosing his principal; and there are a number of other cases where the application of these doctrines has been involved in the result. While the cases are not sufficiently numerous or varied to furnish a complete exposition of the doctrine for use in all future situations, there are enough to make it worth while to collect and analyze them, so that those who have to deal with these situations in future may have the tools of precedent more readily at hand.

It is the purpose of this article merely to display these tools and not to discuss the theories upon which the doctrine has been based any further than is necessary for its better understanding.[1] It is now firmly fixed in the law, though it gives rights to, and fastens liabilities upon, one who has not himself appeared as a party to the transaction in issue. From the point of view of the law of contract such a result seems anomalous.[2] It may be said, of course, that the doctrine is based upon rules peculiar to the relationship of principal and agent, but such a statement hardly gives a reason. It merely states a result of judicial decision. In fact,

[1] For such a discussion, see Mechem, The Liability of an Undisclosed Principal, 23 Harvard Law Review, 513, 590; Lewis, The Liability of the Undisclosed Principal in Contract, 9 Columbia Law Review, 116; Ames, Undisclosed Principal—His Rights and Liabilities, 18 Yale Law Journal, 443, also in Lectures on Legal History, 453; Huffcut, Agency, 160; Story, Agency (9th ed.), § 1729. None of these learned authors have considered the doctrine from its practical side, except very briefly.

[2] But see Lewis, the Liability of the Undisclosed Principal in Contract, supra, n. 1.

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when Lee, C. J., in Scrimshire v. Alderton,[3] allowed P to recover from T upon a contract between A, P's agent, and T, to which P was most obviously not a party,[4] he embarked the courts upon an uncharted sea without any clear guiding light to steer by in future cases. The doctrine has, however, much to commend it from the business man's point of view.[5] To him it is unreasonable that the person really interested in the ordinary commercial contract should not be allowed to sue upon it directly and should not be liable in the first instance,—quite as unreasonable as that the assignee of a commercial chose in action should not be allowed in his own name to sue the person liable. Perhaps the business man is wrong, perhaps he is right; but it is suggested that just as the business man's point of view is the only one that satisfactorily furnished a test whether the relationship of two or more persons is that of partners,[6] so in cases where the rights and liabilities of an undisclosed principal are involved, the test to be applied should be that of the business man's reasonable needs. In the absence of any other clear-cut test, are not the courts at liberty to use this one? It will not be the first time that judges have borrowed from the custom of merchants, which is not law, of course, until sanctioned by decision.[7] In fact the courts have undoubtedly been moved by this consideration. At any rate, notwithstanding the objections of its uncertainty, it is with this point of view in mind that the California cases are here discussed. The propriety of so doing is strengthened by section 2330 of the Civil Code, which recognizes the desirability of a short cut to immediate rights and liabilities between principal and third party, by providing that "all rights and liabilities which would accrue to the agent from transactions within such limit [the scope of his actual or ostensible authority], if they had been entered into on his own account, accrue to the principal." It is curious to note, however,

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[3] (1742-3), 2 Str. 1182.

[4] Except upon the fiction that, as A's principal, he was the real promisee of T,—obviously unsound, because T made but a single promise to A, which is enforcible by A, and can not be said to have made a second promise to P. See 9 Harvard Law Review, 507; 18 Yale Law Journal, 444 n. 10.

[5] Cf. Huffcut, Agency, 161; Mechem, Agency (2d ed.), § 1729; 9 Columbia Law Review, 124, seq.

[6] See Cox v. Hickman (1860), 8 H. L. C. 268.

[7] See 10 Laws of England, 259; Pound, Readings on the History and System of the Common Law (2d ed.), 181, seq.; Goodwin v. Robarts (1875), L. R. 10 Exch. 337.

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that in reaching this same result the courts in this state in many cases have had recourse to decisions elsewhere and have not relied upon the sanction of the Code.[8]

I. PRINCIPAL VERSUS THIRD PARTY.

In cases of this sort it is assumed that the agent, A, acting within the limitations on the authority given him by the principal, P, has made a contract with T, in which T has made a promise to A. Of course T's state of mind, whether expressed or unexpressed, with regard to P may be of various sorts. He may know that P himself is A's principal,—that is, he may know P's existence and also his name, or identity. In such a case, of course, the principal is disclosed, not undisclosed, and if in such a case, T, knowing all the facts, limits himself in contracting to a promise running to A alone, it can be argued with force that he has limited his liability to A, and that P should not be allowed to recover from T in a direct action. While in this event the business man may see no reason why P should not hold T directly, nevertheless T's right to exclude P from a right of action should be recognized. It might be argued that T should insert in the contract some express provision excluding P from such a right and that the mere making of a promise to A should not be enough, but the law has not taken this view, probably wisely.[9] But to proceed to cases where the principal is in fact undisclosed, and to a further analysis of T's state of mind: suppose T knows as a fact that A is acting as an agent and that there is some principal behind him, of whose name and identity he is ignorant. It can be argued that T, knowing the existence of *a* principal, whose identity he might demand for the purpose of contracting with him, has, by making a promise solely to A, chosen to limit his liability to A. On the other hand we can argue that T, recognizing that A is only an agent, and knowing that there is someone behind him, has, by failing expressly to exclude such person from liability, shown himself indifferent to the question whether or not he shall be liable to P. In any event, unless the court find more than that A

[8] The writer has not found any other provisions, either in the Civil Code or Code of Civil Procedure, bearing directly upon the rights and liabilities of an undisclosed principal. The section above referred to may be founded upon Story's dicta in Commentaries on the Law of Agency. See Civil Code of the State of California (1st ed.), 1874, 77; Story, Agency, (9th ed.), § 417 seq.

[9] Cf. Chandler v. Coe (1874), 54 N. H. 561.

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merely disclosed himself as agent, T has been held liable to P.[10] The case does not seem to differ greatly from that where T knows P's name or identity, but a different result is reached. There are two possible explanations. First, the law in case of fully disclosed principals grew up under the influence of rules relating to assumpsit and debt, and became solidified upon the point that P cannot hold T, when P's name or identity is known before the pressure of commercial needs had made itself felt. Such an explanation is historical. Second, the difference may also be explained on practical grounds, which presumes that T is more likely to prefer a contract with a known principal than with his agent, and therefore, if T, knowing who the principal is, contracts with A alone, he has shown that he has not entered into a liability to P. On the other hand, if he does not know who P is, he has not shown that he does not care to be liable to that particular man. There are several California cases, which hold that P can hold T, even though T knows that A is an agent for someone.[11] To continue the consideration of T's state of mind: he may know that A acts as agent sometimes, and sometimes for himself, or he may have no thought at all upon the subject, or he may suppose that A is acting solely for himself. In deciding the question of T's liability to P in these cases, no distinction is made, probably correctly. Of course, if T's state of mind is that first mentioned, and if he knows the law, he necessarily knows that he is more likely to be sued by some unknown principal than if he supposes that A is acting for himself. He might perfectly well have excluded himself from liability to anyone but A by expressly so providing,[12]

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[10] Existence of principal unknown: Crosby v. Watkins (1859), 12 Cal. 85; McKee v. Cunningham (1906), 2 Cal. App. 684, 84 Pac. 260; Eldridge v. Mowry (1914), 24 Cal. App. 183, 140 Pac. 978; Ruiz v. Norton (1854), 4 Cal. 355, semble; Parker v. Otis (1900), 130 Cal. 322, 62 Pac. 927, semble; Nicholls v. Mapes (1905), 1 Cal. App. 349, 82 Pac. 265, dictum; existence of principal in doubt; Eddy v. American Amusement Co. (1908), 9 Cal. App. 624, 99 Pac. 1115, semble; dicta of general application; Ellis v. Crawford (1870), 39 Cal. 523; Wilcox-Rose Construction Co. v. Evans (1908), 9 Cal. App. 118, 98 Pac. 83; Schader v. White (1916), 52 Cal. Dec. 385, 160 Pac. 557. For cases in other jurisdictions, see Mechem, Agency, (2d ed.), §2059 n. 11; 2 C. J. 874 n. 33, where, however, no distinction is made between cases where the principal's existence is known and cases where it is unknown.

[11] Eddy v. American Amusement Co., supra, n. 10, semble; cf. Eldridge v. Mowry, supra, n. 10; and see cases cited in preceding note as containing dicta of general application.

[12] Humble v. Hunter (1848), L. R. 12 Q. B. 310; Wise v. Marine Ins. Co. (1856), 23 Mo. 80, cf. Winchester v. Howard (1867), 97 Mass. 303.

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but if he has not done so, and if he will not be subjected to any more onerous burden or put in a worse position by being under an obligation to P, he should equally be liable whether he thinks A is possibly an agent, does not think at all, or thinks A is acting for himself only.[13]

The situations so far discussed have raised no question as to the nature of the act which the third party has promised to do. It is at once apparent that being subjected to a suit for damages by the principal for failure to perform his promise is quite different from being compelled to perform his promise to, or to accept performance from, the principal instead of the agent. Once T, to resume the nomenclature heretofore adopted, has put himself in the wrong, it does not matter greatly whether he is compelled to pay *damages* to P or to A, provided by making payment in accordance with the court's judgment either to P or to A, whichever sues, he is under no obligation with reference to his broken promise to the other. Similarly, if T's obligation is merely to pay money, it does not matter greatly to whom he has to pay it, in the absence, of course, of a stipulation that it shall be paid in a particular way or at a particular place. We therefore find, as we should expect, that no difficulty has been made in this connection in California cases, where T's only obligation was to pay damages or to make a money payment,[14] except in one case. In Walton v. Davis,[15] A, acting as agent for P, in whose employ he was, made a contract to supply milk to T. T broke the contract, and P sued T for damages. The court refused to allow P to recover. The fact that T's liability, if any, was merely to pay damages and therefore was,

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[13] Crosby v. Watkins, supra, n. 10, agent's contract made " in his own name, without disclosing his principal;" McKee v. Cunningham, supra, n. 10, uncertain; Eldridge v. Mowry, supra n. 10, existence probably unknown; Ruiz v. Norton, supra n. 10, semble, existence unknown; Parker v. Otis, supra, n. 10, semble, uncertain; Nicholls v. Mapes, supra, n. 10, dictum, where A did not explain he was buying from P; Eddy v. American Amusement Co., supra, n. 10, semble, existence "in doubt." See also cases cited in note 10, supra, as containing dicta of general application. For cases in other jurisdictions see 2 C. J. 874 n. 33.

[14] Crosby v. Watkins, supra, n. 13, damages for failure to deliver; McKee v. Cunningham, supra, n. 10, purchase price; Eldridge v. Mowry, supra, n. 10, professional services; Ruiz v. Norton, supra, n. 10, semble, purchase price; Eddy v. American Amusement Co., supra, n. 10, semble, services as actors; Wilcox-Rose Construction Co. v. Evans, supra, n. 10, dictum, construction work. Cf. Parker v. Otis, supra, n. 10, statutory penalty; and Schader v. White, supra, n. 10, specific performance of a contract to convey land.

[15] (1913), 22 Cal. App. 456, 134 Pac. 795.

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so to speak, a neutral obligation which might just as well be performed to P as to A, was not considered by the court. The court's decision was based, however, on the theory that the contract between A and T established a relationship for the performance of personal services, and that such a contract necessarily excluded the possibility of T's being liable to anyone else. This cannot be, because A, by being an agent, had no ability to make a binding contract to be performed on his part. The contract is perfectly good between A and T.[16] Why, therefore, should not P be allowed to sue, when he does not call upon T to do anything different from what he would have had to do if A had sued? Perhaps the answer is that the doctrine of undisclosed principal is a business man's doctrine, and it is not expected or demanded by the needs of commerce that principals in cases like Walton v. Davis should have rights of action. This explanation is fortified by cases outside of California, where the contract was for personal services.[17] It seems to the writer, however, that if the doctrines of undisclosed principal are to be given a logical and complete effect, there is no very good reason why P should not recover damages, even though the contract was not of such a nature that he could demand performance to himself or that he could himself satisfactorily perform.[18]

The recognition of the principal as a proper party to bring suit is not allowed to prejudice the third party, when the latter has looked upon the agent as his promisee. The anomaly of permitting the principal to sue has not been carried so far as to deprive the third party of counterclaims or defenses that he might have had against the agent, when he did not know that the agent was an agent merely. In many jurisdictions this question has arisen when the third party, not knowing the existence of the principal, has had a claim against the agent which he intended to set off against the obligation created,[19] or has subsequently become an obligee of the agent, intending to set off against such claim

[16] See page 196, infra. Cf. Kerry v. Pacific Marine Co. (1898), 121 Cal. 564, 54 Pac. 89, where the agent was held liable to the third party on a charter party; and Jewell v. Colonial Theatre Co., (1910), 12 Cal. App. 681, 108 Pac. 527, where the agent was held liable to the third party on a contract by which the third party was to appear as an actor.

[17] Eggleston v. Boardman (1877), 37 Mich. 14, dictum; Kelley v. Thuey (1891), 102 Mo. 522, 15 S. W. 62; Winchester v. Howard (1867), 97 Mass. 303. See also 2 C. J. 875 n. 39.

[18] Mechem, Agency (2d ed.), § 2067.

[19] Mechem, Agency (2d ed.), § 2077; 2 C. J. 877 n. 52.

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his obligation to the agent.[20] The courts work out the right to a set-off upon estoppel. The agent has the real principal's authority to make a contract representing himself as principal and the real principal will not be allowed to say that the agent was in fact only an agent. Of course, the elements of an estoppel are lacking when the third party knows the agent is only an agent.[21] There are no cases in California in which this question has arisen, but the existence of an estoppel is recognized by section 2336 of the Civil Code, which provides that "One who deals with an agent without knowing or having reason to believe that the agent acts as such in the transaction, may set off against any claim of the principal arising out of the same, all claims which he might have set off against the agent before notice of the agency."

The question of defenses to suits by the principal has arisen in decided cases in another connection, and it has been held that third party may rely upon a payment made to the agent.[22]

Of course other examples of defense may occur in future. One true rule for determining their validity, it is submitted, is that already indicated: the principal's right to sue, being anomalous, and for the purpose of a short cut, should never be allowed to permit him to deprive a third party, who has contracted with an agent as principal, of such defenses as he would have if the agent were in fact the principal and sued him directly. The rule is founded on estoppel, which ordinarily does not exist when the third party knew that there was a principal, i. e. that the agent was only an agent.[23]

II. THIRD PARTY VERSUS PRINCIPAL.

The doctrine of undisclosed principal is not limited to giving the principal rights, but also is applied to make him directly liable

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[20] Baxter v. Sherman (1898), 73 Minn. 434, 76 N. W. 211, dictum; cf. Frame v. William Penn Coal Co. (1881), 97 Pa. 309; 2 C. J. 877 n. 52. But see 2 C. J. 878 n. 55; Nicholls v. Martin (1885), 35 Hun. 168.

[21] Isaac Cooke & Sons v. Eshelby (1887), L. R. 12 A. C. 271; Ex parte Dixon (1876), L. R. 4 Ch. D. 133; Baxter v. Sherman, supra, n. 20, dictum. See also Mechem, Agency (2d ed.), § 2079; 2 C. J. 878 ns. 57-61. But see note 49, infra. Of course, if at the time the claim to a set-off arises, the third party has learned of the principal's existence, the elements of an estoppel are lacking.

[22] Argenti v. Brannan (1885), 5 Cal. 351; Lumley v. Corbett (1861), 18 Cal. 494. In the former case there is a dictum that payment could be made even after knowledge of the agency. In some cases, of course, such a result may be justified on showing that the agent's powers included power to receive payment.

[23] See Ruiz v. Norton, supra n. 10; 28 L. R. A. (N. S.) 227 n., 231 n.

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to the third party, not only in cases where the third party knew of his existence, but also in cases where the third party did not know he existed and contracted with the agent as principal. In these cases it is assumed, necessarily, that A, the agent, acting within the limitations on his authority, has made an enforceable promise to T, who either does not know that P exists or else knows that there is some unknown person for whom A acted. In California P has been held liable to T in each of these two situations.[24] The result is, needless to say, as anomalous as that which permitted P to sue, but is firmly fixed in the law,[25] and to the same extent has the needs of the business world behind it. In the same way, too, when T does in fact know P's identity he cannot hold him,—perhaps on the theory that knowing his identity and taking the personal promise of the agent instead, he can be said to have excluded him from liability.[26]

In these cases, also, the illogicality on contractual theories of the remedy permitted gives rise to difficult questions in connection with defenses. Here the California law is singularly lacking in view of the number of cases upon other points.

Perhaps the most difficult situation is that which arises when the principal, counting on the fact that the third party has contracted with the agent only, settles with the latter. When under such circumstances should he nevertheless be chargeable by the third party? This is not a question which has arisen in this state

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[24] Existence of principal unknown: Thomas v. Moody (1881), 57 Cal. 215; Goss v. Helbing (1888), 77 Cal. 191, 19 Pac. 277; Dashaway Association v. Rogers (1889), 79 Cal. 211, 21 Pac. 742; Bradford v. Woodworth (1895), 108 Cal. 684, 41 Pac. 797; Curran v. Holland (1903), 141 Cal. 437, 75 Pac. 46; McKee v. Cunningham, supra, n. 10; Jewell v. Colonial Theatre Co., supra, n. 16, probably; Montgomery v. Dorn (1914), 25 Cal. App. 666, 145 Pac. 148, probably; Sims v. Frew (1914), 24 Cal. App. 725, 142 Pac. 106; Puget Sound Lumber Co. v. Krug (1891), 89 Cal. 237, 26 Pac. 902, dictum; existence of principal probably known: Alta Planing Mill Co. v. Garland (1914), 167 Cal. 179, 138 Pac. 738; Schader v. White, supra, n. 10; uncertain whether principal known or unknown; Estrella Vinyard Co. v. Butler (1899), 125 Cal. 232, 57 Pac. 980, dictum; Schindler v. Green (1905), 7 Cal. Unrep. Cas. 229, 82 Pac. 341. See Ellis v. Crawford (1870), 39 Cal. 523, for a dictum of general application. The dictum of Sawyer, J., in Sayer v. McNulty (1864), 1 Cal. Unrep. Cas. 130, at p. 133, is opposed to many of the foregoing decisions and is therefore probably no longer law.

[25] Mechem, Agency (2d ed.), §§ 1731 n. 47, 1732 ns. 50, 51; 2 C. J. 840, 841, ns. 70-72. The principal's liability to the third party has been spoken of as a "God-send," Blackburn, J., in Armstrong v. Stokes (1872), L. R. 7 Q. B. 598.

[26] Ferguson v. McBean (1891), 91 Cal. 63, 27 Pac. 518, 14 L. R. A. 65. See also 2 C. J. 841 ns. 73, 74.

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except in one case,[27] where, however, the court did not find a completed settlement such as exonerated the principal from liability to the third party. Outside California, there seem to be two theories, both of which can be traced to leading English cases. One starts with the assumption that by the law relating to undisclosed principal the latter is liable to the third party, and being chargeable with knowledge of the law can only settle with the agent at his peril. The practical result of this theory is that the principal can only escape liability, when he has been induced by conduct or representations of the third party to believe that the latter does not intend to look to him. Such a theory, needless to say, favors the third party. Is it logical? It starts with the premise that the third party can hold the principal, and its conclusion depends on the validity of that rule,—but we have seen that the whole doctrine is anomalous,[28] and, as has been already suggested, courts are at liberty to regard this premise as *prima facie* merely, and to decide the question from the practical standpoint of the needs of business men.[29] The second theory permits the principal to settle with his agent in the ordinary way,[30] though of course the third party should be allowed to charge the principal if he notifies him that he intends to do so in time. It is suggested that this latter rule is fairer to all parties and better serves business needs. The third party unexpectedly finds himself with an extra string to his bow,—a "God-send." He has shown a willingness to look only to the agent. There is no reason why he should be permitted to use that extra string to prevent the principal from settling with his agent in the ordinary way. It is quite apparent that in the case of distant factors and brokers the principal will be in serious trouble if he is not allowed so to do, and if he must wait till his agent makes settlement, for he cannot safely put the agent in funds.

Of course the foregoing rules do not apply when the existence of the principal is disclosed, for being chargeable with knowledge

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[27] Sims v. Frew, supra, n. 24, and see Cal. Civ. Code, § 2335.

[28] See p. 183, infra.

[29] Heald v. Kenworthy (1855), 10 Exch. 739, is the leading case standing for this doctrine. For a full discussion of both doctrines, see Mechem, Agency (2d ed.), § 1738-1749. It is favored by Mr. Mechem and also in Beaumont, The Liability of an Undisclosed Principal for Goods Purchased by his Agent, 23 American Law Review, 565. See also 2 C. J. 847 n. 14.

[30] Armstrong v. Stokes, supra, n. 25; Fradley v. Hyland (1888), 37 Fed. 49. See also references in preceding note and 2 C. J. 847 n. 12.

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of his agent's acts, the principal is bound to know that the third party may wish to use his extra string.[31] It is to be hoped that the California courts when the question arises will apply the latter rule rather than the former. It is possible that they are bound to do so by section 2335 of the Civil Code, which provides that "If exclusive credit is given to an agent by the person dealing with him, his principal is exonerated by payment or other satisfaction made by him to his agent in good faith, before receiving notice of the creditor's election to hold him responsible." But it is not clear exactly what "good faith" referred to in the statute, means. It can be argued with force, however, that this section contains a recognition of the second theory rather than the first, for certainly the principal can act in good faith even though the third party has made no positive representation to him.

While there are no California cases settling conclusively this important question, there is one case that bears on another question perhaps as important. How far should the third party be allowed to pursue one of his two remedies against agent or principal without prejudicing his chance to succeed on the other? The authorities permit no satisfactory conclusion as to what conduct constitutes such an election. All that can be said is that there may be conduct having this effect. Clearly, charging the agent or some other person on the third party's books ought not to be regarded as a binding election.[32] But suppose the third party has begun a suit against the agent before seeking to charge the principal, either with or without knowledge of the principal's existence?[33] It is suggested as a fair working rule that when he was without knowledge of the principal's existence, he should be allowed to discontinue on paying ordinary legal costs, but if he had such knowledge, while it is unfair to deprive him of all right against the principal, he ought not to be allowed to pursue that right without paying the agent the actual expense to which the agent was

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[31] Mechem, Agency (2d ed.), § 1749; but in Irvine & Co. v. Watson & Sons (1880), 5 Q. B. D. 414 this distinction is repudiated.

[32] McKee v. Cunningham, supra, n. 10, but see the opinion of Smith, J.

[33] Cf. Puget Sound Lumber Co. v. Krug (1891), 89 Cal. 237, 26 Pac. 902, where the third party, after learning of the principal's identity, had proved in bankruptcy against the agent. No objection on the ground of election was made to his maintaining an action later against the principal, a right apparently admitted.

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put.[84] Suppose further that the suit against the agent goes to judgment. Here we have a new factor to be considered. If the third party has but a single right of action, that right of action is necessarily merged in the judgment and he cannot later pursue the principal, but if he has two rights of action, the rules above indicated could fairly be applied so long as judgment is not satisfied. Has the third party one or two rights of action? As will be seen, the third party has an undoubted right against the agent on the contract as made.[85] He is also allowed to sue the principal. This can scarcely be because the law creates out of whole cloth an independent collateral obligation. It should go no further than to make the principal liable on the contract made by the agent. There is, then, a single obligation with two obligors, who are not joint obligors but probably, if the term may be used, alternative obligors, or at least so a business man would regard them.[86] Judgment against one merges the right of action or obligation in the judgment. The third party after obtaining judgment against the agent, whether with or without knowledge of the principal's existence, should not be allowed to proceed against the other.[87] These views, however, are merely suggested, since the whole subject has not been consistently worked out by judicial decision.[88]

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[84] There is no judicial sanction for this view that the writer has been able to discover. The cases are in much confusion and for the most part decide what is not an election.

[85] See p. 194, infra.

[86] Kendall v. Hamilton (1879), L. R. 4 A. C. 504; Brannan v. Purcell (1884), 41 Oh. St. 187, 202; cf. Morel Bros. & Co., Ltd. v. Earl of Westmoreland, [1902] 1 K. B. 64, aff'd, [1904] A. C. 11, not a case of undisclosed principal; see Booth v. Barron (1898), 29 App. Div. 66, 51 N. Y. Supp. 391.

[87] See 2 C. J. 846 ns. 6-8; 21 L. R. A. (N. S.) 786 n.; 6 L. R. A. (N. S.) 729 n; and particularly, Kendall v. Hamilton supra, n. 36; but in the following cases the existence of a doctrine of merger independent of the doctrine of election was in effect denied, and it was held that when the third party has obtained judgment against the agent without knowledge of the principal, such judgment, so long as unsatisfied, is not a bar to an action against the principal: Lindquist v. Dickson (1906), 98 Minn. 369, 107 N. W. 958; Greenberg v. Palmieri (1904), 71 N. J. L. 83, 58 Atl. 297; Remmel v. Townsend (1894), 83 Hun. 353, 31 N. Y. Supp. 985; Brown v. Reiman (1900), 48 App. Div. 295, 62 N. Y. Supp. 663. Beymer v. Bonsall (1875), 79 Pa. 298 is to the same effect, even though the third party had such knowledge.

[88] See the authorities cited in the preceding note and also Mechem, Agency (2d ed.), §§ 1750-1762; 17 Harvard Law Review, 414. In California, if the third party brings one suit against both principal and agent, apparently questions of election and merger have no place. See Cal. Code Civ. Proc., §§ 383, 427. In Jewell v. Colonial Theatre Co., supra, n. 16, in the same suit judgment was entered against both principal and agent, but apparently no objection on the ground of merger or election was made by

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So far the discussion has related to the anomalous parts of the whole doctrine that has grown up around the undisclosed principal. We now proceed to situations, where the question of liability can be worked out according to contractual rules, and the effect of the principal's liabilities or obligations is indirect.

III. Third Party versus Agent.

This is the simple situation where the third party, having made a contract with the agent, chooses to hold the agent, ignoring or ignorant of his claim against the principal.[39] In all these cases the questions that arise, apart from those bearing on defenses that will be discussed later, relate to whether or not there was a contract between third party and agent. This, of course, is a question of the law of contracts and not properly within the scope of this article, except in one particular. Let us suppose that the existence of a principal, but not his identity, be disclosed: it can be argued that the third party in such a case cannot look upon the agent as intending to bind himself. Such an argument has persuasive force when the agent contracts as agent only, or when the contract is of such a nature that it is unlikely that the agent intended to be bound.[40] But unless these added elements appear, the agent is liable,[41] even though the existence of a principal is known.[42] It has so been held in California.[43] Such a view is obviously correct

either defendant. In Montgomery v. Dorn, supra, n. 24, where suit was also brought against both agent and principal, there was a dictum that judgment against the agent was no ground for objecting to a judgment against the principal.

[39] Cases where one is given by another such appearance of ownership as creates an estoppel against the other are not here discussed. Cf. Amann v. Lowell (1885), 66 Cal. 306, 5 Pac. 363.

[40] E. g., Chase v. Debolt (1845), 7 Ill. 371; American Alkali Co. v. Kurtz (1905), 134 Fed. 663 aff'd (1905), 138 Fed. 392; Southwell v. Bowditch (1876), 1 C. P. D. 374. See also 2 C. J. 818 n. 29.

[41] Mechem, Agency (2d ed.), § 1410 n. 90; 2 C. J. 818 n. 30.

[42] Mechem, Agency (2d ed.), § 1411 n. 92; 2 C. J. 817 n. 25; 2 L. R. A. 812 n.; 47 L. R. A. (N. S.) 232 n. 11.

[43] Agent liable to third party: Murphy v. Helmrich (1884), 66 Cal. 69, 4 Pac. 958 existence of principal probably not disclosed; Bradford v. Woodworth (1895), 108 Cal. 684, 41 Pac. 797 existence not disclosed; Kerry v. Pacific Marine Co. (1898), 121 Cal. 564, 54 Pac. 89 where agent signed as "managing owner;" Jewell v. Colonial Theatre Co., supra, n. 16, existence probably not disclosed; Bogart v. Crosby (1889), 80 Cal. 195, 22 Pac. 84 dictum, agent liable if he failed to "make known" his principal; Puget Sound Lumber Co. v. Krug, supra, n. 33, dictum, agent liable if existence of principal not disclosed; Alta Planing Mills Co. v. Garland (1914), 167 Cal. 179, 138 Pac. 738, dictum, same; Nicholls v. Mapes, supra, n. 10, dictum, agent liable if he does not explain he was buying for his principal. Cf. Schader v. White, supra, n. 10, where the court regarded

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in both cases. There is, of course, no reason why an agent should not obligate himself personally, if such be his communicated intention. Such is usually the intention of the ordinary commercial agent, when he does not make it plain that he is acting for a definite named person. There is less difficulty, of course, in the case where the existence of the principal is not revealed. There, obviously, the communicated intention of the agent is to bind himself.

In all these cases there coexists the liability of the principal, which is important in relation to defenses set up by the agent to such a suit. Here again there are no California cases, though the situation is likely to arise.

The first of these possible defenses is that of election and merger, upon which the writer's views have already been given.[44] It is suggested that in this connection it is unimportant whether it is principal or agent who is relying upon an election or a merger. The reasons for the rules are based on procedural expediency rather than on the merits of the issues involved. The principal is not a surety, but an alternative obligor. It does not therefore matter whether it be he or the agent who sets up the defense of an election against the other, or a merger of the third party's right of action in a judgment against that other. There may, however, be this difference of fact. The case, already adverted to, where the third party sues one of his two alternative obligors without knowing of the existence of the other, can, of course, only occur when he sues the agent first, and therefore the case where he should be allowed to discontinue upon paying no more than legal costs is limited to the case where he so sues.[45]

Other matters of defense which the agent might set up readily occur; for example, payment by the principal.[46]

Should the agent be allowed to set off against the third party

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the case as one of undisclosed principal (but query), and the agent's liability was apparently conceded, if his defenses failed. In Montgomery v. Dorn, supra, n. 24, the court below dismissed the action against the agent, who signed a contract in his own name without qualification, on his showing that he contracted as agent only, although apparently there was no evidence the third party knew of this fact. Agent not liable: Schindler v. Green, supra, n. 24, semble, where third party knew the agent was an agent only and the contract was for work and labor; cf. Chase v. Debolt, supra, n. 40.

[44] See p. , supra. See also Cobb. v. Knapp (1877), 71 N. Y. 348, 27 Am. Rep. 51.

[45] As previously stated the writer has found no legal sanction for these views.

[46] See Morrison v. Currie (1854), 4 Duer (N. Y.) 79, 84.

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claims by the principal against the third party? This is a matter depending on statutory construction. If set-offs are limited to the parties to the suit, there should clearly be no such set-off, but if they can be asserted between the real parties in interest, then clearly a set-off should be allowed, since the right to a set-off is not conditioned upon knowledge by the other party that it exists.[47] Such statutes exist in some states,[48] but not in California, where the statute on the subject provides that counterclaims must be those existing in favor of a defendant and against the plaintiff.[49].

IV. Agent Versus Third Party.

Here again the question of liability turns upon whether or not the third party made a contract with the agent as his promisee, and the doctrines of undisclosed principal influence the situation only when we come to the question of the third party's defenses. Although the law gives the principal a right against the third party directly, it does not do so at the expense of the agent's contractual right.[50] The doctrines of undisclosed principal are not in lieu of contractual rights into which the parties have let themselves. The agent may generally recover if a contract to him was in fact made.[51]

The question of defenses next arises.

If the third party has already paid or performed to the prin-

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[47] Where the statute is in the usual form no such set-off is allowed: Forney v. Shipp (1857), 4 Jones Law, 527; Elwell v. Skiddy (1879), 77 N. Y. 282. Of course, if the set-off arose out of the same transaction the agent may avail himself of it, as being personal to himself. See Leterman v. Charlottesville Co. (1910), 110 Va. 769, 67 S. E. 281; and dicta in the first two cases above cited, and 25 A. & E. Encyc. of L. (2d ed.), 539.

[48] See 25 A. & E. Encyc. of L. (2d ed.), 527 ns. 2, 3; 34 Cyc. 717 n. 40.

[49] Cal. Code Civ. Proc., § 438. But cf., § 440, which provides that "When cross demands have existed between persons under such circumstances that, if one had brought an action against the other, a counterclaim could have been set up, the two demands shall be deemed compensated, so far as they equal each other. . . ." Could it not be argued that since the principal, if sued, could have set up a counterclaim, the third party's claim must be regarded as "compensated," i. e. paid, in a suit against the agent, so that a defense of payment could be made? If this argument were to prevail, it would equally apply, when a principal whose existence is known, sues the third party who has a counterclaim against the agent. Cf. note 21, supra.

[50] Tustin Fruit Assoc. v. Earl Fruit Co. (1898), 6 Cal. Unrep. Cas. 37, existence of principal not disclosed; Bliss v. Sneath (1894), 103 Cal. 43, 36 Pac. 1029, semble; Eddy v. American Amusement Co., supra, n. 10, semble, existence of principal apparently disclosed. Cf. Phillips v. Henshaw (1855), 5 Cal. 509.

[51] Mechem, Agency (2d ed.), § 2025 n. 10; 2 C. J. 830 n. 8.

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cipal, he should not be liable a second time to the agent. The principal is, of course, entitled to the benefit of the contract made by his agent, and his receiving these benefits discharges the third party of all liability. California courts would undoubtedly so hold.[52]

Suppose that the third party has a counterclaim or set-off against the principal, and is sued by the agent. No question of estoppel can, of course, arise, since he could not have entered into this contract, relying on a set-off against one whom *ex hypothesi* he did not know had an interest in the contract. The question must therefore turn on the form of the statute, and if no set-off is allowed against the real parties in interest but only between the parties to the suit, it would seem clear that the third party can only enforce his right against the principal in a separate action. In California there is one case upon this point, decided under section 438 of the Code of Civil Procedure.[53] It was held that the third party might set-off against the agent's suit a counterclaim arising out of a separate transaction against the principal. No mention was made of section 440 of the Code of Civil Procedure.[54] The only statute under discussion was limited to counterclaims between plaintiff and defendant. The decision is hard to support. If the court had section 440 in mind, the court would probably have so stated. Under that section also, the proper pleading would, perhaps, not be of a set-off or counterclaim, but of payment, on the theory that the right of action upon which the agent relied was "compensated" or paid, since in a suit by the principal against the third party the third party could have counterclaimed. Perhaps the answer is that section 440 cannot be thus collaterally relied on. If so, the case under discussion seems doubly wrong.

All the possible combinations of parties, in which questions under the doctrine of undisclosed principle may arise, have now been discussed,[55] although it be obvious that a very great num-

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[52] 2 C. J. 830 ns. 15, 16.

[53] Bliss v. Sneath, supra, n. 50.

[54] See n. 49.

[55] It is probably unnecessary to state that the doctrines of undisclosed principal do not apply to negotiable instruments or to instruments under seal in jurisdictions where the distinction between sealed and unsealed instruments has not been wholly abolished. Mechem, Agency (2d ed.), §§ 1734-6, 2064, 2065; 2 C. J. 843, 876 seq. The writer has found no California cases bearing upon the application or nonapplication of the doc-

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ber of defenses beyond those herein mentioned may come before the courts.[56] In making their decisions, the courts have practically a free hand, for there are few legislative enactments upon the subject, and they can develop the doctrine, guided by principle and precedent, without the confusing and complicating effect of arbitrary statute law. As Antaeus gained strength from mother earth, the courts in wrestling with these problems should remember their source and the impulse that is responsible for the doctrine. They are as free now as they ever were to look to the law merchant for guidance. It is true that any rule based on the understanding of business men must needs be vague, but the doctrine is with us to stay, bringing its vagueness with it, and there is no other test that is adequate.

Austin Tappan Wright.

Berkeley, California.

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trine to negotiable instruments. The latter exception is probably unimportant here: Pacific Improvement Co. v. Jones (1912), 164 Cal. 260, 128 Pac. 404; cf. Ferguson v. Bean, supra n. 26; Bliss v. Sneath, supra, n. 50.

[56] For example: When the agent acts for several principals, the plaintiff failed to recover in Beckhusen v. Hamblet, 6 Times L. Rep. 278, where the third party sued the principals, and in Roosevelt v. Doherty (1880), 129 Mass. 301, and Midwood v. Alaska Packers Assoc. (1907), 28 R. I. 303, 67 Atl. 61, where one of the principals sued the third party. See also Mechem, Agency (2d ed.), §§ 2080-2082, defense in suits by principal against third party; Mechem, The Liability of an Undisclosed Principal, 23 Harvard Law Review 590, at 602. As to the liability of an undisclosed principal for unauthorized acts of his agent, see Durant v. Roberts, [1900] 1 Q. B. 629, criticized in 14 Harvard Law Review, 153.

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Injunction Without Damage As Illustrated By a Point in the Law of Waters

WHERE decisions conflict, there is usually sufficient interest to justify an attempt to find the cause. The immediate topic, "change of use of water" is often litigated, and therefore of practical importance. Nevertheless, for our present purpose it is rather a vehicle to carry discussion of a larger principle which it illustrates, more than it is an end in itself.

In 1857 the Supreme Court of California said: "It would seem clear that a mere change in the use of waters from one mining locality to another, by the extension of the ditch, or by the construction of branches of the same ditch, would by no means affect the prior right of the party."[1] In 1860 it further ruled: "A person entitled to divert a given quantity of the water of a stream, may take the same at any point on the stream, and may change the point of diversion at pleasure, if the rights of others are not injuriously affected by the change."[2]

These pioneer decisions, one upholding change of place of use, and the other change of point of diversion, are the beginning from which the principle has run through the law of prior appropriation of water that an appropriator may change his use—(manner of use, place of use, purpose of use or point of diversion)—"if others are not injured by the change." It has usually passed into statute.[3] In 1910 in Colorado the point of diversion is said to be in itself a "mere incident,"[4] and in 1914 in the same jurisdiction it is said: "We are committed to the doctrine that the point of diversion, the conduit, the place of application and the character of use may each and all be changed;"[5] and this was again repeated but a few months ago.[6]

The test is always added, that others must not be injured by the change. The statement in Kidd v. Laird, the original prece-

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[1] Maeris v. Bicknell (1857), 7 Cal. 261, 263.
[2] Kidd v. Laird (1860), 15 Cal. 161, 179.
[3] For example, Cal. Civ. Code, § 1412.
[4] Windsor Co. v. Hoffman Co. (1910), 48 Colo. 82, 109 Pac. 422.
[5] Ironstone D. Co. v. Ashenfelter (1914), 57 Colo. 31, 140 Pac. 177.
[6] Arnold v. Roup (Colo. 1916), 157 Pac. 206.

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dent, is that "In all cases the effect of the change upon the rights of others is the controlling consideration." It has been universally accepted and restated.[7]

But the test thus given has not turned out as easy as it seemed. It has received widely variant interpretations. It is even coming to nullify the rule itself.

It invites a long-standing controversy in the law. What is such an "injury" as will prevent the change? If it means a present and immediate damage it is easy enough to apply, and is often so applied; or even if the harmful result of the change may not be immediate, it may, after delay, be sure to come; here also the test is easy enough to apply. But there is the far greater

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[7] The statement that the decisive test is whether the change will or will not injure others, is repeated in the authorities given in Wiel, Water Rights in the Western States, (3d ed.), Chapter 22, and the following authorities since decided:

California: Cheda v. Southern Pacific Co. (1912), 22 Cal. App. 373, 134 Pac. 717, (point of diversion); Barton v. Riverside Co. (1909), 155 Cal. 509, 101 Pac. 790, 23 L.R.A. (N.S.) 331 (point of diversion.)

Colorado: Vogel v. Minnesota Co. (1910), 47 Colo. 534, 107 Pac. 1108; New Cache etc. Co. v. Water Supply Co. (1910), 49 Colo. 111 Pac. 610, (point of diversion); Larimer Co. v. Poudre Valley Co. (1912), 23 Colo. App. 249, 129 Pac. 248, (point of diversion); Farmers Co. v. Wolff, (1913), 23 Colo. App. 570, 131 Pac. 291, (point of diversion); Montevista Co. v. Centennial Co. (1913), 24 Colo. App. 496, 135 Pac. 981, (point of diversion); Ironstone Ditch Co. v. Ashenfelter (1914), 57 Colo. 31, 140 Pac. 177, (place of use); Consolidated Co. v. Town of Evans (1915), 59 Colo. 482, 149 Pac. 834, (point of diversion); Phillips Investment Co. v. Cole (1915), 150 Pac. 331, (purpose of use); Rogers v. Nevada Canal Co. (Colo. 1915), 151 Pac. 923, (place of use); Greeley Co. v. Huppe, (Colo. 1915), 155 Pac. 386; Arnold v. Roup (Colo. 1916), 157 Pac. 206, (place of use).

Idaho: Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038, (point of diversion); Hall v. Blackman (1912), 22 Idaho 556, 126 Pac. 1047, (place of use); Joyce v. Rubin (1913), 23 Idaho, 296, 130 Pac. 793, (point of diversion); Washington Sugar Co. v. Goodrich (Idaho, 1915), 147 Pac. 1073, (point of diversion).

Montana: Featherman v. Hennessey (1911), 43 Mont. 310, 115 Pac. 983, (purpose of use); Hansen v. Larsen (1911), 44 Mont. 39, 120 Pac. 229; Lokowich v. City of Helena (1913), 46 Mont. 575, 129 Pac. 1063, (point of diversion).

Nevada: Doherty v. Pratt (1912), 34 Nev. 343, 124 Pac. 574.

Oregon: Amalgamated Sugar Co. v. Hempe (1915), 226 Fed. 1012, (point of diversion); In re Willow Creek (1914), 74 Ore. 592, 144 Pac. 505, (place of use); In re North Powder River (1914), 74 Ore. 83, 144 Pac. 485, (place of use and point of diversion).

Washington: United States v. Union Gap Irrigation Co. (Wash. 1913), 209 Fed. 274; Mally v. Weidensteiner (Wash. 1915), 153 Pac. 342, (point of diversion).

Wyoming: Nichols v. Hufford (1913), 21 Wyo. 477, 133 Pac. 1084 (place of use); Groo v. Sights (Wyo. 1913), 134 Pac. 269, (point of diversion); Holt v. City of Cheyenne (Wyo. 1914), 137 Pac. 876 (point of diversion).

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field where, although the change is no immediate harm, nor sure to come, it may be impossible to say whether it will come or not. It may come and it may not come; no one can be sure. Is this risk to be forced upon the owner in such cases for the benefit of one who is changing the status quo? Is the owner "injured" by having that risk imposed upon him for the benefit of a disturber of the established order?

The test of "injury to others" opens into this wide field, into which the limitless future enters, as to what *may* happen. To answer it, the party wanting to change must say, "I will not harm you even in the future; harm from my change not only will not occur now, but will never occur. Damage from the change is *impossible.*" That is a great length to go. What may or may not happen in the future only one with the gift of prophesy can prove. Just as soon as impossiblity of damage theoretically enters as a factor, it is again cast out because of the impossibility of following it up. In mathematics quantities are dealt with which grow always smaller as they are traced further, never entirely disappearing, but dwindling finally to a limit beyond which they are so infinitesimal that they must be disregarded. If *"impossibility* of damage" is a theoretical basis for denial of an injury, yet inability to determine it makes it finally, in the last analysis, as good as gone. Change becomes *per se* an injury.

Upon this basis rests the doctrine known as *"injuria sine damno."* It is the doctrine that protects owners against even the risk of loss from acts of another who changes the status quo. And it is working into the topic of change of water uses, turning the rule of change, if without "injury," into rule that change is *per se* an injury and may not be made.

Movement toward this position seems going forward in Colorado by putting upon the changer the burden of proving affirmatively that there will be no injury. There is an early ruling in California, followed in Montana, putting the burden upon the party opposing the change,[8] and Colorado also was formerly strong in upholding changes. But it now demands "strict adherence to the rule that the burden of proof of showing that injury will not result is upon the person seeking judicial authority for

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[8] Jacob v. Lorenz (1893), 98 Cal. 332, 33 Pac. 119; Hansen v. Larsen, supra, n. 7; Lokowitch v. City of Helena, supra, n. 7.

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the change."[9] And it seems now so enacted in a California statute.[10]

Under the form of burden of proof, or a rule of pleading and evidence, this, if logically applied, eliminates from change the greatly predominant class of cases, already mentioned, where the result of the change cannot be told in advance. Proof of the asertion of "no possible injury" is a burden which, strictly applied, will be itself impossible. It must cover the future, since title to property lasts forever ("to have and to hold unto his heirs and assigns forever"). The most that the party making the change can prove about the future is that, in view of the past experience, damage may be so remote that its possibility is beneath serious notice. But that gives him only the residue within the rule "de minimis non curat lex." It leaves to him only the extreme instances where chance of damage appears to be absolutely trivial.

Putting upon the changer the burden of disproving possible injury thus restores the familiar ground long recognized in equity jurisdiction that impossibility to measure damages is cause for equity to act by injunction to prevent interference with existing conditions. Equity, refusing to force a property owner to assume a risk, declares that "impossibility to estimate damage" is of itself sufficient cause to grant its injunction against the act complained of.

Colorado seems therefore coming, through the burden of proof, to injunction *without* damage; enjoining the change simply to vindicate ownership against even the chance of damage; the rule that any change is an injury *per se*, unless the prospect of damage is so remote and absolutely trivial as to be within the rule "de minimis non curat lex." In fact, the Supreme Court of Colorado expressly puts the burden of proof this way against the changer because he "disturbs the existing order,"[11] which is the ultimate basis of the rule "injuria sine damno;" the injunction being simply to preserve existing conditions and enable the owner to say, "things shall remain as they are."

The rule that change is *per se* an injury is approached in another way by the holding that a certain very common type of

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[9] Farmers etc. Co. v. Wolff, supra, n. 7. Accord, Montevista Co. v. Centennial Co., supra, n. 7; New Cache etc., Co. v. Water Supply Co., supra, n. 7. There is something of the same view in a Wyoming case, Groo v. Sights, supra, n. 7.

[10] Cal. Stats. 1913, p. 1012, § 16.

[11] New Cache etc. Co. v. Water Supply Co., supra, n. 7.

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interference is prohibited; namely, loss of return flow from the changer's ditches, flumes, or other works, or loss of return seepage to the stream from irrigated lands. Such loss so frequently, upon settled streams, attends any substantial change in point of diversion or in the locality or quality of lands irrigated or in the purpose of use (as from water power to irrigation), that little opportunity for change remains without it where the other water users in the locality are numerous. In a Colorado case it is said of an attempt to move a point of diversion up stream, that "all ditches between the two points of diversion can be and have been supplied in a large measure by return waters which there make up the body of the stream; and therefore the change in point of diversion *must necessarily* injure the ditches further up the stream to the full extent of the amount changed during a considerable portion of the irrigation season."[12] Of the great extent of the operation of this in practice, it has been declared: "Changes in location affect return seepage, and if permitted would makes *all water titles* unstable."[13] That this loss of return water is a prohibited injury and prevents change is established.[14]

That change is per se an injury is entering also upon the line of public policy. The Court of Appeal in Colorado says that change of point of diversion has become an excuse for renewing old claims that have never been used, and encourages speculation in such claims, resulting in irreparable loss to bona fide users,

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[12] Farmers etc. Co. v. Wolff, supra, n. 7.

[13] U. S. Geological Survey Water Supply, paper 344, page 136.

[14] California: Kidd v. Laird (1860), 15 Cal. 161; Dannebrink v. Burger (1914), 23 Cal. App. 587, 138 Pac. 751, (loss of return seepage from leaking ditches and flumes); Pomona Co. v. San Antonio Co. (1908), 152 Cal. 632-633, 93 Pac. 881, (loss of return seepage from irrigated lands).

Colorado: Larimer Co. v. Poudre Co. (1912), 23 Colo. App. 249, 129 Pac. 248, (loss of return seepage); Montevista Co. v. Centennial Co. (1913), 24 Colo. App. 496, 135 Pac. 981, (loss of return flow); Farmers etc. Co. v. Wolff (1913), 23 Colo. App. 570, 131 Pac. 291, (loss of return seepage from irrigated lands); Fort Collins Co. v. Larimer Co. (Colo. (1915), 156 Pac. 140, (loss of return seepage.)

Idaho: Bennett v. Nourse (1912), 22 Idaho, 249, 125 Pac. 1038, (loss of return seepage); Hall v. Blackman (1912), 22 Idaho, 556, 126 Pac. 1047, (loss of return seepage from irrigated lands); Washington Sugar Co. v. Goodrich (Idaho, 1915), 147 Pac. 1073, (loss of return flow by change from sawmill to irrigation.)

Montana: Featherman v. Hennessey (1911), 43 Mont. 310, 115 Pac. 983, (loss of return flow by change from power to irrigation.)

Oregon: In re North Powder River (1914), 75 Ore. 83, 144 Pac. 486, (loss of return flow by change from water power to irrigation.)

Washington: U. S. v. Union Gap Co. (1913), 209 Fed. 274, (loss of return flow.)

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and its effect has been vicious.[15] In California the legislature has joined the current of legislation by prohibiting change of point of diversion except upon investigation and permission from State officials.[16] Of change of place of use on a sale, the Supreme Court of Oregon says that any surplus over the initial use of the prior appropriator belongs to other existing users, and change by sale for use on other lands is against the tendency of law.[17] And in another case the same Court says: "In the arid states the principle is gaining ground 'that the right to use the water for irrigation inheres in the land irrigated,' and is inseparable therefrom or separable only with permission of the water board or like authority."[18] In Wyoming a statute was made to read, "Water rights cannot be detached from the lands, place or purpose for which they are acquired, without loss of priority."[19] Of change of purpose of use, a California Statute now reads, "Water . . . . appropriated or acquired for one specific purpose shall not be deemed to be appropriated or acquired for any other or different purpose."[20] This widening application, to all classes of change, of the rule that a change is of itself an injury is urged in the field as the progressive and advanced doctrine. It is said that "changes from one purpose to another without loss of priority should be prohibited as against public policy, because different amounts of water are consumed in different uses. Most changes seriously affect other rights below."[21]

Complete recognition of the rule "injuria sine damno," whereby change of the status quo is an injury *per se* to existing owners, is in entire possession of the class of cases involving change of structures (such as a ditch, flume, dam, road) upon another's land. This is an injury *per se* that will be enjoined at the landowner's request without a showing of actual damage. Even though the easement for the structure was acquired while the land was still public, yet after the land upon which the structure lies has become private any change is *per se* an injury to such landowner, because

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[15] Farmers Co. v. Wolff (1913), 23 Colo. App. 570, 131 Pac. 291.
[16] Cal. Stats. 1913, p. 1012, § 16.
[17] In re North Powder River (1914), 75 Ore. 83, 144 Pac. 486.
[18] In re Willow R. (1914), 74 Ore. 592, 144 Pac. 505. See also Claypool v. O'Neill (1913), 65 Ore. 511, 133 Pac. 349.
[19] See Groo v. Sights (Wyo. 1913), 134 Pac. 269, holding that this does not prohibit change of point of diversion.
[20] Cal. Stats. 1913, p. 1012, § 39. See also §§ 11, 17, 20, 23, 33, 39, 41.
[21] U. S. Geological Survey Water-Supply Paper, 344, page 135.

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an owner of land has the absolute right to keep it in the condition that he got it. A strong ruling to this effect is quoted in the note, and is in accord with general authority at this time.[22] Nor is there room for a contention that the change would be a benefit rather than a detriment to the landowner; he has the right to be his own judge of that or he would cease to be master of his own property.[23]

Exceptions must be noted.

Rights of action for change of the status quo belong to the

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[22] "That a change in the mode of enjoyment might have been made while the government still owned the servient tenement does not alter the case. That was because the owner of the servient tenement—the government—had accorded a license through the statute to appropriate any such rights at any time prior to the grant of patent or allowance of homestead or preemption. But, when the government granted the fee, it granted it subject not to the license, but to vested and accrued rights which had then been acquired under the license. By the grant the title to everything not then appropriated became vested in the respondents as completely as the appropriated rights had become vested in the appellant. Thereafter the jus disponendi incident to the fee was in respondents as to every right not vested in others by actual prior appropriation. The manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right of way—in short, the easement—became fixed and determined by the facts as they existed when respondents' homestead entry was allowed. No change can now be made in the character of the servitude. A pipe line cannot be substituted for a ditch and flume, nor the right of way changed or lengthened. As to these things the authorities are uniform." White Bros. v. Watson (1911), 64 Wash. 666, 117 Pac. 497, citing inter alia Wiel, Water Rights in the Western States (2d ed), pp. 285, 286, § 179-180. See also Wiel, Water Rights (3d ed.), § 221 et seq., 499; and the following authorities since decided:

California: Brown v. Ratliff (1913), 21 Cal. App. 282, 131 Pac. 769.

Colorado: Haines v. Fearnley (1914), 56 Colo. 243, 138 Pac. 541; Larimer Co. v. Larimer Co. (1914), Colo. App., 143 Pac. 270; Snyder v. Colorado etc. Co. (C. C. A. Colo.) 181 Fed. 62.

Idaho: Young v. Regan (1911), 20 Idaho, 275; 118 Pac. 499; King v. Chamberlain (1911), 20 Idaho, 504, 118 Pac. 1099; Marshall v. Niagara Co. (1912), 22 Idaho, 144, 125 Pac. 208; Tobey v. Bridgeford (1912), 22 Idaho, 566, 127 Pac. 178.

Kansas: Rolers v. City of Hutchinson (1910), 83 Kan. 618, 112 Pac. 129.

Nevada: Bidleman v. Short (Nev. 1915), 150 Pac. 834.

Oregon: Pringle Falls Co. v. Patterson (1913), 65 Ore. 474, 132 Pac. 527; Talbott v. Joseph (Ore. 1916), 155 Pac. 184.

South Dakota: Metcalf v. Nelson (1895), 8 S. Dak. 87, 65 N. W. 911; Geiger v. McMahon (1913), 31 S. Dak. 95, 139 N. W. 958.

Washington: White Bros. Co. v. Watson (1911), 64 Wash. 666, 117 Pac. 497; State v. Superior Court (1912), 70 Wash. 442, 126 Pac. 945.

Wyoming: Bucknum v. Johnson (Wyo. 1912), 127 Pac. 904; Laughlin v. Bd. of Control (Wyo. 1912), 128 Pac. 517; Groo v. Sights (Wyo. 1913), 134 Pac. 270.

[23] "Counsel argues with much force and persuasiveness that, inasmuch as the respondents will in no wise be injured by a change from ditch and flume to pipe line, the right to make the change should be accorded to the

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parties whose rights are infringed. Persons not in privity with an infringed owner have no standing to complain. Change of point of diversion, or manner, place or purpose of use cannot be contested by one who is not himself affected, on the plaint that others on the stream, however many, are going to suffer. That is no argument. Between strangers to the landowner, ditches on his land may be changed at will. So long as he is silent, no rival appropriator can avoid the change as being a violation of the right of the landowner. So, also, any one appropriator may change as against a rival appropriator not injured thereby, however much the change may or may not infringe upon still other appropriators or riparian owners. The party actually infringed may have the paramount right, but so long as he is silent the first appropriator has a *possessory right* in the changed use, which is good against the world except the paramount right, and until the paramount right is asserted.[24]

Another exception is that injunction against changes is given to preserve existing rights in natural streams. Flows of artificial origin are not included. The creator of the artificial flow may make changes at its source without hindrance from others to whom it has come, for such others have no right of continuance of the source, against him. In natural flows the source is by natural creation, but in waste from a ditch, or the run-off of water pumped from a mine, or the like, the source is manufactured by the ditch or pump owner. Rights against him in the source would be rights to have his "water factory" kept going.

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appellant; that the taking of the additional right of way and conducting the water in a pipe line invades no substantial right of the respondents. But even if it were shown that the change would be an actual benefit to the respondents, we would have no power to compel them to accept the benefit. The question is one of property rights, not of benefits or injuries. Many authorities so hold, and we have been cited to none to the contrary. 'No one has a right to compel another to have his property improved in a particular manner. It is as illegal to force him to receive a benefit as to submit to an injury.'" White Bros. Co. v. Watson (1911), 64 Wash. 666, 117 Pac. 497. Accord, Allen v. San Jose Co. (1891), 92 Cal. 138, 28 Pac. 215.

[24] See Wiel, Water Rights (3d ed.), Chapter 11 (Reprint); and §§ 498, 499, 500, 625, 626, 627, 628; and see 1 California Law Review, 11; 2 id. 25.

"As to the question of a change in the purpose of the diversion to a different beneficial use from that of the original appropriation, appellant, not having an interest in the water by virtue of an appropriation, is in no position to complain." Campbell v. Goldfield W. Co. (1913), 36 Nev. 458, 136 Pac. 976.

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They can be had only by contract from him or the like; not by simply receiving his waste. This statement may be somewhat too broad to be exact, but it is near enough for present purposes. Any change by him of his ditch or pump, changing or stopping the source of the manufactured flow, is no cause of action. Damage or no damage does not enter here. There is no right invaded by the change in the first place; certainly not where the change is made in good faith for some purpose of the maker, without malice or mere ill-will to the persons deprived thereby.[25] This exception applies, however, only to changes at the source. It also only applies to permit changes by the producer of the artificial flow. The law is that among all the rest of the world except the producer, the flow follows the usual law of water-courses, and it is immaterial between them how that flow came to be.[25a] Strangers to the producer are not concerned with his rights when they are not privy to him, and he is not setting them up himself.

The rule that change can be made "if no injury to others" was begun on common law authority. In the original precedent, cited at the beginning, for change of point of diversion, the court quoted common law decisions and texts and drew its conclusion from them.[26] But when it comes to defining "injury" there is in all parts of the law this twilight zone between "damage" and "injury" that causes different views.[27] An illustration elsewhere is where riparian owners seek injunctions against change of conditions by nonriparian owners. Some rulings say such change will not be stopped unless it is shown to be "injurious;" others (and the weight of authority) hold such change to be an injury "per se;" and the debate continues unsettled still.[28] In the common law of easements the question has arisen how far the dominant owner can change the use of the easement. Here the ruling against the change seems to be accepted with less dispute.[29]

It seems worth recalling that in 1856 and 1860, when the

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[25] See Wiel, Water Rights, (3d. ed.), §§ 53-62; 29 Harvard Law Review 137.

[25a] See the paper of the present writer in 29 Harvard Law Review, 137.

[26] Kidd v. Laird (1860), 15 Cal. 161, 181.

[27] See 1 C. J. 964; Wiel, Water Rights, (3d ed.), § 642.

[28] Wiel, Water Rights, (3d ed.), Ch. 35; 2 California Law Review, 340.

[29] 14 Cyc. 1206, 1211. "Plaintiff established a prescriptive right to the use of the water for stock purposes, and it is so found, but there is no evidence and no finding that he acquired any such right to use the water for household or domestic purposes or for irrigation." (Held fatal).

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original rulings permitting changes were made, and during the period up to the end of the eighties when they were spread through the western water law, the locality was a wide expanse of public domain, where changes were mainly upon public land. The "injury," if any, was predominantly to the United States, who raised no objection. Since then settlement has occupied much of the region around water supplies. Land and rights in water have become private property. The rule that there must be no injury to them has become more prominent than the rule of change. Those who may be injured have increased and multiplied and now assert their rights, and along with this has come a stricter view of what constitutes an "injury."[80]

Whatever the reason, a glittering generality that was very easy of statement and seemed simplicity itself, seems to be turning against itself in its application today.

Samuel C. Wiel.

San Francisco, California.

Gurnsey v. Antelope etc. Co. (1907), 6 Cal. App. 393. A prescriptive right for watering stock cannot be changed to irrigation, Duckworth v. Watsonville Co. (1907), 150 Cal. 520, 89 Pac. 338. A right of way to carry water to certain lands cannot be changed to carry it to other lands, Logan v. Guichard (1911), 159 Cal. 592, 114 Pac. 989. Easement granted for "supply pipes" of a water system cannot be changed to use as distributing pipes; that is, pipes for conveying water from one reservoir to another cannot be used for conveying water from the reservoir to consumers, Gray v. Cambridge (1905), 189 Mass. 414, 76 N. E. 195. One cannot substitute an iron pipe in place of a flume or trough, against the opposition of the owner of the land upon which it lies, Lewis v. Meredith (1913), 1 Ch. 571, 580.

[80] See in Re North Powder River (1914), 75 Ore. 83, 144 Pac. 486.

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Inalienable Rights of Property: A Study of Contract Obligations and Other Vested Rights

VI. Rights of Individuals Under Particular Transactions.

Time as of which contract rights vest.—The constitutional and statutory law in force at the time a contract is made enters into and becomes a part of it; and the rights which become vested by virtue of a contract are those created by the act of the parties in view of such law.[1] Where a public contract for street work, to be completed in a specified time, and to be paid for by local assessment to be collected after the work was done, was entered into by a city in the fall of 1879, a provision of the state constitution,[2] adopted in 1879 to take effect in January of the following year, requiring that where public work in a city is to be paid for by local assessment, the assessment be collected and paid into the city treasury before any contract for doing the work is let, does not apply; and, such contract being valid under the law in force when it was made, was not invalidated by the constitutional provision, either as a whole, or merely as to work not done thereunder when the new constitution took effect: the fact that after January 1, 1880, the time to complete the work was extended by the city pursuant to authority given by such street law, does not affect the result, the granting of the extension not being a novation

[1] Robinson v. Magee (1858), 9 Cal. 81; Tuolumne Redemption Co. v. Sedgwick (1860), 15 Cal. 515; Ede v. Knight (1892), 93 Cal. 159, 28 Pac. 860; Welsh v. Cross (1905), 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63.

In case of carriage of persons or property by a railroad, the law, constitutional and statutory, regulating such matter, subsisting at the time and place of the making of the contract and where such contract is to be performed, enters into and forms a part of the contract, the same as though set forth at length in the contract. James v. Oakland Traction Co. (1909), 10 Cal. App. 785, 103 Pac. 1082; Southern Pacific Co. v. Superior Court (1915), 27 Cal. App. 240, 150 Pac. 397, opinion being reserved by supreme court on denying rehearing, 27 Cal. App. 256, (carriage of freight, the long and short haul clause of the state constitution being involved).

[2] Art. 11, § 9.

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or new contract.[3] Where at the time a municipality contracted an indebtedness to an individual, its power to contract the same was limited, there is no violation of the obligation of a contract in restricting the rights and remedies of the individual on such contract to those to which he was entitled under the limitations of the law which prevailed when he made the contract.[4] Where in 1872, when a note and mortgage were executed and the mortgagor died, the Probate Act,[5] provided:

> "No holder of any claim against any estate shall maintain any action thereon, unless the claim shall have been first presented to the executor or administrator,"

and section 1500 of the Code of Civil Procedure, as enacted in 1872 to take effect in 1873, embodied the above section of the Probate Act with the proviso that,

> "An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint,"

and thereafter the deceased mortgagor's will was probated, and notice to his creditors published, and subsequently this proviso was repealed, and later the note and mortgage became due, after which the time to present a claim thereon expired without the presentation of any, and with the exception expressed in section 1500 as enacted in 1872 the law at all times had been that a claim not presented was "forever barred;" it was held that the mortgagee contracted with reference to the law in force at the time its note and mortgage were executed, and never acquired any vested right to foreclose its mortgage without first presenting a claim, and the repeal of the proviso by the amendment did not impair the obligation of its contract.[5a]

Indefeasibility of contract rights not dependent on form of action.—The principle that rights created by a contract are vested

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[5a] Per McKinstry, J., concurring in judgment in Hibernia Savings & Loan Soc. v. Jordan (1880), 2 Cal. Unrep. Cas. 79, 5 Pac. Coast L. J. 381, (reversed on rehearing); Same v. Hayes (1880), 56 Cal. 297, 7 Cal. Unrep. Cas. 398, 6 Pac. Coast L. J. 686, on ground that the amendment of 1874 did not apply to an estate wherein notice to creditors had been published before it took effect).

[3] Oakland Paving Co. v. Barstow (1889), 79 Cal. 45, 21 Pac. 544; Ede v. Cogswell (1889), 79 Cal. 278, 21 Pac. 767; Ede v. Knight, supra, n. 2.

[4] Smith v. Broderick (1895), 107 Cal. 644, 40 Pac. 1033, 48 Am. St. Rep. 167.

[5] Cal. Stats. 1851, p. 448.

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and cannot be impaired by a subsequent change in the law which entered into and became a part of the contract, is applicable in actions of tort for violation of the law so entering into the contract, as well as in actions of contract on the contract.[6]

Pensions and benefits.—By statute a fund was provided for the insurance of the San Francisco police, the fund consisting of a monthly sum paid by each police officer, and the accumulations thereof. This act was impliedly superseded by a later act which contained provisions inconsistent with the first, and this second act was superseded by the freeholders' charter of 1899. Until the happening of a contingency upon which, under that of the foregoing enactments in force at the time of its happening, a benefit was payable out of the fund created by them, the right of the beneficiary thereto was a mere expectancy and not a vested right.[7] Thus the right to a benefit was to be determined by the law in force at the time of the happening of the contingency, and was subject to be lost by a change in the law[8] or by the discharge of the police officer[9] before the happening thereof. But upon its happening, the right to the benefit became vested and was not thereafter subject to be lost by any change in the law.[10]

Measure of damages for tort.—It cannot be held that a change in an arbitrary and statutory standard of measurement of damages in cases of tort, when applied to a person who had suffered a wrong before the change, impairs the obligation of a contract or deprives him of any vested right, even though by the change the amount of damages recoverable by him for the wrong was reduced.[11] Thus where at the time of the wrongful conversion of certain personal property section 3336 of the Civil Code provided that the detriment caused by the wrongful conversion of personal property "is presumed to be . . . . the value of the property at the time of the conversion, with the interest from that time, or,

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[6] James v. Oakland Traction Co., supra, n. 1.

[7] Pennie v. Reis (1889), 80 Cal. 266, 22 Pac. 176, affirmed (1889), 132 U. S. 464, 33 L. Ed. 426, 10 Sup. Ct. Rep. 149.

[8] Pennie v. Reis, supra, n. 7; Cohrn v. Henderson (1912), 19 Cal. App. 89, 124 Pac. 1037.

[9] Clarke v. Reis (1891), 87 Cal. 543, 25 Pac. 759.

[10] Kavanaugh v. Board of Police Pension Fund Commissioners (1901), 134 Cal. 50, 66 Pac. 36.

[11] Tulley v. Tranor (1878), 53 Cal. 274, 2 Pac. Coast L. J. 312.

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where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party," together with "a fair compensation for the time and money properly expended in pursuit of the property," and after an action for damages for such conversion had with reasonable diligence been commenced and before the trial thereof this section was amended by striking out the alternative permitting recovery in certain cases of "the highest market value of the property at any time between the conversion and the verdict;" the injured party could not in such action recover such highest market value, but was restricted to a recovery of the value "at the time of the conversion, with the interest from that time."[12]

Unenforced penalty.—"No person has a vested right in an unenforced penalty."[13] Thus where the statute provided that in the event that the directors of a corporation failed to make the necessary reports they should be liable to the stockholders, jointly and severally, to the extent of one thousand dollars, and a stockholder recovered judgment, but pending the appeal the statute was amended to read that the stockholder could only recover actual damages, it was held that this amendment prevented any further prosecution of the litigation.[14]

VII. Adjective and Remedial Rights.

I. General Principles.

Adjective and remedial rights are placed by the constitutional guaranties beyond the reach of alteration by legislative act only so far as necessary for the protection of vested substantive rights. A change in adjective and remedial rights may always be made, provided that after the change a remedy remains which, in comparison with that existing before the change, is reasonably efficient. Adjective and remedial rights may not, however, be entirely denied, nor changed so as to defeat or impair a vested substantive right or render it scarcely worth pursuing.[1]

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[12] Tulley v. Tranor, supra, n. 11.
[13] Anderson v. Byrnes (1898), 122 Cal. 272, 54 Pac. 821.
[14] Anderson v. Byrnes, supra, n. 13.
[1] Smith v. Morse (1852), 2 Cal. 524; People v. Hays (1854), 4 Cal. 127, compare, however, remarks of Heydenfeldt, J., dissenting, p. 156;

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On the other hand, where a debt or duty is recognized by law as legally binding, an adequate remedy, though never theretofore existing, may be given for the enforcement.[2]

In the application of these principles, it is often a difficult question whether a particular right is substantive in its nature, or adjective or remedial; and whether, if adjective or remedial in its nature, a change therein, applied to existing subject-matters, impairs vested substantive rights. In the further progress of this discussion, it will therefore be desirable to consider:

First—Whether particular statutory changes affect substantive, or only adjective or remedial, rights;

Second—Whether particular changes in adjective or remedial rights impair vested substantive rights.

In what follows, the material under these sub-heads has not in all cases been rigidly classified as between them, for where in regard to the same topic both questions have been treated by the courts, as, for instance, in case of redemption law, and statutes of limitation, it has seemed best, owing to the intimate connection between the materials under the two sub-heads, to consider all the points that have arisen under the first.

And finally, under separate sub-heads, will be considered certain instances wherein the courts have considered whether or not particular remedial rights are essential to the protection of substantive rights, and one instance wherein the court, in its zeal to declare a law unconstitutional, held that to confer a certain remedial right in specified cases, subverted inalienable rights of property.

Billings v. Hall (1857), 7 Cal. 1; Scarborough v. Dugan (1858), 10 Cal. 305; Tulley v. Tranor, supra, n. 11; People v. Brooks (1860), 16 Cal. 11; Hibernia Savings & Loan Soc. v. Hayes, supra, n. 5; Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead (1890), 85 Cal. 80, 24 Pac. 648; Los Angeles v. Teed (1896), 112 Cal. 319, 44 Pac. 580; Teralta Land & Water Co. v. Shaffer (1897), 116 Cal. 518, 48 Pac. 613, 58 Am. St. Rep. 194; Welsh v. Cross (1905), 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63; Boggs v. Ganeard (1906), 148 Cal. 711, 84 Pac. 195; James v. Oakland Traction Co., supra n. 6; Title Ins. & Trust Co. v. Lusk (1911), 15 Cal. App. 358, 115 Pac. 53; Buck v. Canty (1912), 162 Cal. 226, 121 Pac. 924; Southern Pacific Co. v. Superior Court (1915), 27 Cal. App. 240, 150 Pac. 397, (opinion on all points involved reserved by supreme court, 27 Cal. App. 256).

[2] People v. Seymour (1860), 16 Cal. 332; Galland v. Lewis (1864), 26 Cal. 46; Aikins v. Kingsbury (1915), 170 Cal. 674, 151 Pac. 145.

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2. PARTICULAR STATUTORY CHANGES AS AFFECTING SUBSTANTIVE OR ONLY REMEDIAL RIGHTS.

It is sometimes a difficult matter to distinguish between the right and the remedy.[3]

Changing mode of probate sale.—In an early case where it was held that a special law authorizing the administrator of a decedent's estate to sell land of such estate on grounds additional to those permitted at the time of the decedent's death invaded vested rights of the distributees of the estate, the court, however, said that a special law which authorized the administrator to sell in a mode not provided in the general law, as by private sale, would be remedial and unobjectionable.[4]

Validating informal acts.—A statute validating a contract or conveyance made in good faith, but not in the mode prescribed by the then existing law, and void under such law, cannot be said to divest a vested right: there is no vested right to take advantage of a defect in form.[5] Thus where a statute of 1863 authorized married women to make and revoke powers of attorney in the manner and to the extent provided by the act,[6] and theretofore a married woman was incompetent to execute a power of attorney, but section 4 of the act provided:

> "All powers of attorney heretofore made and executed by any married woman, with her husband, and acknowledged and certified in the manner provided in section 1 of this act, and all conveyances heretofore and hereafter executed under and by virtue of such powers of attorney, and acknowledged and certified in the manner provided in section 2 of this act, shall be valid and binding; provided, that no rights already vested in third persons shall be affected by anything in this section contained;"

section 4 is not open to objection as impairing the obligation of contracts or as divesting vested rights.[7]

However, "it is a well settled proposition that where some

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[3] Smith v. Morse (1852), 2 Cal. 524; Aikins v. Kingsbury, supra, n. 2.
[4] Brenham v. Story (1870), 39 Cal. 179.
[5] Dentzel v. Waldie (1866), 30 Cal. 138.
[6] Cal. Stats. 1863, p. 165.
[7] Dentzel v. Waldie, supra, n. 5, (a married woman cannot, after the passage of the act, maintain an action to set aside a conveyance of her separate land, made before the passage of the act, pursuant to a power of attorney given by her); Dow v. Gould & Curry Silver Mining Co. (1867), 31 Cal. 629, (the act validated an assignment of a certificate of corporate stock, standing in the name of a married woman, made pursuant to a power of attorney given by her before the passage of the act).

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essential ceremony in the matter of executing a will has been neglected, so that the will is not lawfully executed, and such essential requisite has been dispensed with by a law enacted after the death of the person attempting to make such will, the law cannot be applied thereto and the person must be held to have died intestate."[8] The vested rights of some third persons in the decedent's estate would be injuriously affected.

Removing speed limit of street cars after accident from excessive speed.—Where a proximate cause of an injury to a street car passenger was a violation of a state law regulating the speed of cars, it was held that the law was a condition entering into the contract of the carrier with such passenger, a rule of property and not a mere matter of procedure or rule of evidence, and continued to apply in an action by such passenger for damages from such injuries, notwithstanding its later repeal.[9]

Authorizing interception of contract price for street work.—Where the special charter of San Jose city of 1874 provided for the acceptance or rejection of street work done for the city under contract therefor after certain inspection, and if accepted required a warrant on the general fund to be drawn "in favor of the contractor for the amount due upon such contract;" and the charter was amended so as to provide that upon the acceptance of the work notice thereof must be given by publication, that at any time before the warrant is drawn any person furnishing labor or materials in the performance of the work may file with the city a verified claim for the amount due him, that if not disputed by the contractor any such claims shall be paid from the moneys owing the contractor, pro rata if necessary, and charged to the contractor, and that if any such claim is disputed the amount claimed shall be retained by the city treasurer out of the contract price until such claim is adjudicated in a court of competent jurisdiction, it was held that the amendatory act could not be applied to a contract for street work entered into by the city before the amendatory act took effect, even though the contract was finished afterwards, although the verified claims filed with the city were not disputed by the contractor and were paid by the city; notwithstanding such payment the contractor

[8] In re Patterson's Estate (1909), 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, 26 L. R. A. (N. S.) 654, 18 Ann. Cas. 625.
[9] James v. Oakland Traction Co., supra, n. 1.

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was entitled to receive from the city the contract price of his contract.[10]

Making fraudulent as against creditors certain transfers.—Where at the time an insolvent debtor conveyed certain real property without consideration section 3442 of the Civil Code provided that the fraudulent intent in such a transfer was a question of fact, which could not be found merely from the fact of absence of consideration, and later the proviso was added that "any transfer or incumbrance of property, made or given voluntarily or without a valuable consideration, by a party while insolvent, or in contemplation of insolvency, shall be fraudulent and void as to existing creditors," it was held that the proviso could not be applied to the conveyance in question. Section 3442 is something more than a rule of evidence; it is a rule of property as well, for under the section as it stood before the proviso was added, insolvency was only a circumstance tending to show fraudulent intent, and there might be other controlling facts which would relieve the act from any fraudulent intent and validate it, but under the amendment, fraudulent intent is presumed from the act as matter of law, and no conceivable fact can remove such presumption.[11]

Changes relating to public obligations.—An important group of cases have to do with statutory changes bearing upon obligations already incurred by public authorities.

In the absence of an express contract to the contrary, the state or a public body thereof may make such appropriation of its revenues as it may from time to time elect, even to the extent of forbidding the payment therefrom of an existing obligation.[12] Its creditors have nothing to rely upon except its good faith; it cannot be sued or made amenable to judicial process except with

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[10] McGee v. San Jose (1885), 68 Cal. 91, 8 Pac. 641, the court saying: "The legislature could not, by an act passed after this contract was made, change its terms or authorize a performance different from that prescribed in the contract." (The real effect of the amendatory act in question appears, however, merely to have been to give certain of the contractor's creditors a new remedy, by intercepting the contract price of his contract.)

[11] Cook v. Cockins (1897), 117 Cal. 140, 48 Pac. 1025.

[12] McDonald v. Griswold (1854), 4 Cal. 352 (353, 354); Hunsaker v. Borden (1855), 5 Cal. 288; San Francisco v. Beideman (1861), 17 Cal. 443; Sharp v. Contra Costa County (1867), 34 Cal. 284; Rose v. Estudillo (1870), 39 Cal. 270.

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its consent.[13] In a case in 1855 it was further said that the right to sue a county may be withdrawn at will at any time.[14] On the other hand, it was held in 1891 that where at the time Sacramento city contracted a bonded indebtedness its charter provided that the city might "sue and be sued in all courts and in all actions whatsoever," the legislature could not thereafter by any act it might pass take away from any holder of any such bonds his right to sue the city thereon.[15]

The holder of an audited debt of a public body cannot, however, be required to submit to a new auditing thereof,[16] nor to accept other obligations of such body in payment thereof.[17] The legislature cannot declare duly audited claims against a county invalid, nor authorize an auditing board to do so, nor impose additional conditions upon creditors.[18]

Moreover, if the revenue has been provided by law, and the money produced by it for the purpose of paying the debts the state has contracted to pay, the creditor, who by law is entitled to the money, has an interest in the fund of which the legislature cannot deprive him.[19]

And where by the express provision of the law by acceptance of which a contract with the state or public authority is made, specific provision is made for the auditing and payment of the demand of the person who entered into such contract, or for raising revenue to pay the demands against the state or public body arising under such contract, or appropriating money to its payment, such provisions constitute part of the contract obligation, and the rights of such contractee cannot be destroyed or impaired by any subsequent legislation.[20]

San Francisco funding act of 1851.—In concluding this discussion of public obligations, the series of cases dealing with

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[13] Hunsaker v. Borden, supra, n. 12; Sharp v. Contra Costa County, supra, n. 12.

[14] Hunsaker v. Borden, supra, n. 12.

[15] Bates v. Gregory (1891), 89 Cal. 387, 26 Pac. 891.

[16] Robinson v. Magee (1858), 9 Cal. 81; Rose v. Estudillo (1870), supra, n. 12.

[17] McDonald v. Griswold, supra, n. 12, where the court said: "We do not believe that the legislature could compel the holders of county scrip to fund the same, unless by their consent."

[18] Rose v. Estudillo, supra, n. 12.

[19] Rose v. Estudillo, supra, n. 12; Laforge v. Magee (1856), 6 Cal. 650.

[20] People v. Brooks (1860), 16 Cal. 11; English v. Board of Supervisors (1861), 19 Cal. 172.

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the San Francisco city funding act of 1851, will be considered together, although some of them bear more or less fully on points already made.

This act authorized the holders of the floating indebtedness of San Francisco city to exchange their demands against the city for certificates of indebtedness bearing ten per cent interest, termed city stock, required the board of "commissioners of the funded debt," created by the act, to certify to the city assessors annually before the general assessment-list was made out, the amount which must be raised "for the payment of the interest of the debt so funded for the current year," and the assessors to add to the annual budget "the amount so certified, ... and . . . . the further sum of $50,000 in each and every year, for the purpose of a sinking fund for the redemption of such stock," provided that "the first moneys collected upon the whole of such general assessment-list . . . . shall be paid . . . . by the city treasurer into the hands of said commissioners as fast as collected; and no payment shall, either directly or indirectly, be made out of the moneys assessed or collected upon the said assessment-list, for any other purpose, until the amount authorized . . . . shall have been actually paid over to said commissioners," required said commissioners with said moneys to pay the interest on the city stock and use the residue for said sinking fund purposes as prescribed by the act, made wilful violation of the act by any public officer a misdemeanor, and gave the district court power to enforce the act. Thereafter, pursuant to such act, holders of city indebtedness exchanged their demands for city stock. Shortly after the city and county of San Francisco were consolidated by The Consolidation Act important questions as to the effect of the new instrument of government upon the contract of the holders of city stock arose. This lead the Supreme Court to say in one of the earlier cases where such questions were involved:[21]

> "Nothing which adds any new risks, delays, or embarrassments to the execution of this contract as it is written, can be grafted on its original terms. . . . The substantial right is that this sum shall certainly be raised, and that the first moneys collected upon the whole general assessment list are to be paid to the treasurer, and by the treasurer into the hands of the commissioners as soon as collected. . . .

[21] People v. Bond (1858), 10 Cal. 563.

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> It is just as incompetent for the legislature to subject this money, lying in the treasury in trust for the commissioners, and immediately payable to them, to the supervision, discretion, or control of the board of supervisors, as it would be incompetent to add any other term to the contract. . . . The debt is due and liquidated. . . . It requires no auditing. The propriety of the payment is not to be passed upon. The simple ministerial duty of counting and handing over the money to the treasurer, who alone is trusted with the duty, remains; and he must discharge that legal duty, thus cast upon him, and not wait until it pleases the supervisors to meet, and meeting, to take up the question, and, taking it up, allow it to be paid or not at their discretion."

The following year, in an opinion by the same justice, the court further declared:[22]

> "The act of 1851 is a law as well as a contract. . . . While in its substantive provisions it partakes of the nature of a contract and has the sanctity and inviolability of one, yet it is of the very nature of the law that those of its provisions which are merely legislative modes to give effect to the substantial purposes of the act may need revision and alteration. The details may, as in other laws, be altered where the alteration does not affect the security of the bondholders. New provisions may be added for their security, and other provisions may be added for the protection or security of the city."

Accordingly the court held that the Consolidation Act cannot be given the effect of withdrawing from the possession and control of the commissioners any part of the annual proceeds of the tax required by the act of 1851.[23] But where the Consolidation Act provided for the election of but one assessor, and not for the three provided by the city charter of 1851 and placed the sole power to levy city and county taxes in the hands of the board of supervisors, it was not the right nor the duty of the assessor so provided to add to the amount of taxes required by the supervisors to be collected the amount necessary for the purposes of the commissioners, but the first revenue derived from such taxes must be paid by the treasurer to the commissioners, as in the act of 1851 required.[24] And where the act of 1851 provided for the purchase and redemption of the city stock with

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[22] Thornton v. Hooper (1859), 14 Cal. 9.
[23] People v. Woods (1857), 7 Cal. 579.
[24] People v. Bond, supra, n. 21.

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such moneys as came into the hands of the commissioners beyond that required for interest and expenses, "provided, that no stock shall be so purchased at a price higher than par," but stock could not be purchased at that price and a surplus accumulated in the commissioners' hands, there was no constitutional objection to a statute[25] amending the proviso to read: "provided, that no proposal shall be accepted at any higher premium than five per cent above par;" no better method of providing for the security of the surplus could be conceived.[26] Again, where the act of 1851 vested in the commissioners certain lands,[27] and gave them "the right, at such time and place as in their discretion the interest of the city may require, to expose at public sale or to lease the property," and required them to "apply the proceeds of such sale or lease to the liquidation of the floating debt of said city," it would not be within the power of the legislature to deprive the holders of the city stock of this additional security.[28] There is, however, no objection to a statute providing that where any person had been in actual possession of any of said land, personally or by his tenants or predecessors in interest, from January 1, 1855, and was a purchaser in good faith for value, and claimed title thereto under a statute ratifying the grants made by the Van Ness ordinance of June 20, 1855, the commissioners might, if the land had not been already disposed of by them, convey it to him on payment of costs and a certain further sum: a public sale, as provided in the act of 1851, of land subject to such an adverse claim, would seldom produce more than a nominal sum.[29]

Redemption laws.—A second important group of cases deals with changes in redemption laws, that is, laws authorizing the redemption by owners and other specified persons of real property from tax sales, execution sales, or judicial foreclosure sales, and prescribing the terms on which such redemptions are allowable, and the procedure by which they are effected. The right of redemption from sales on judicial process was first introduced into this state by the Practice Act of 1851.[30] Before that time

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[25] Cal. Stats. 1858, p. 178.
[26] Thornton v. Hooper, supra, n. 22.
[27] Board of Education v. Fowler (1861), 19 Cal. 11.
[28] Supra, n. 23.
[29] Babcock v. Middleton (1862), 20 Cal. 643.
[30] Cal. Stats. 1851, p. 51.

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all such sales had been absolute, without right of redemption. Since that time a right of redemption, though undergoing many changes, has always been recognized.

It is apparent that the adoption and alteration of such laws create different problems of vested rights, according as they are viewed from the standpoint of creditor, debtor, purchaser at the sale, or redemptioner. The first case in this group[31] involved a sale under a money judgment rendered after the redemption law took effect, on a contract debt which had become due before then. Only the rights of the purchaser were in question. Justice Wells in the leading opinion argued that the redemption law could not be applied to the sale in question, because it would hinder the creditor in collecting his money, and thus impair to some extent the obligation of his contract, and that the purchaser must be presumed to have known that this was so. Chief Justice Murray concurred in the judgment on other grounds. Justice Heydenfeldt, dissenting, declared that it could not be assumed that the judgment debtor had only enough land to pay the debt in question when sold absolutely, that under the exacting conditions of redemption prescribed, it could not be inferred that land would bring less when sold subject to redemption than when sold absolutely, that the redemption law left the creditor a substantial remedy, that the only contract in which the purchaser was interested was that which he made when he bought at the sale, that he must be presumed to have looked to the law as it existed at that time, and that certainly the application to the sale of the redemption law did not violate any vested right of his.

The next case[32] involved the question whether the change made in the Practice Act by a statute of 1859[33] of the terms upon which a subsequent redemption could be made, applied to an attempted redemption by a redemptioner of certain land which had been sold, on foreclosure of a mortgage, to the judgment creditor, after the amendment took effect. The court held that redemption laws related solely to the remedy, that rights of redemption were given to prevent a sacrifice of the land at forced sale, not as a part of the contract between the parties but to pre-

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[31] People v. Hayes (1854), 4 Cal. 127.
[32] Tuolumne Redemption Co. v. Sedgwick (1860), 15 Cal. 515.
[33] Cal. Stats. 1859, p. 139.

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vent an abuse of the remedy, that a sale either with or without a right of redemption is an adequate remedy, that the change did not affect the contract of mortgage, that the mortgagee had no vested right to have the land sold in any particular way, that the only contract the redemption law entered into or of which it became a part was that of the purchaser at the sale, and that it was the redemption law in force at the time he bought that became a part of his contract, and in the terms of which the purchaser secured vested rights. As said by two justices of the Supreme Court in the leading opinion:

> "The legislature has no right to alter the terms of a contract already in existence; it has a right to alter the remedy. The contract in this case was the engagement to pay money; the remedy was a forced sale of the property of the debtor; the mode of the sale was a matter of legislative discretion."

And on denying a rehearing the court said:

> "The whole aim of our opinion was to show that this matter of redemption was a new contract, not connected with the original contract, but created or authorized by statute as a part of the remedy."

In the third case,[34] in 1869, the court held on the authority of the latter case, and of the opinion of Justice Heydenfeldt in the former, that where a money judgment was rendered before, but land was sold thereunder after, the redemption law of 1851 took effect, the sale was subject to redemption, notwithstanding the judgment creditor was purchaser at the sale.

The result, then, of these early decisions was:

1. That redemption rights relate only to the remedy, and a sale either with or without a right of redemption affords an adequate remedy.
2. That whether the first conclusion is right or not, it is certain that neither a purchaser nor a redemptioner can complain of the application to his situation of the law in force when the sale was made.

In subsequent cases the right of purchasers and redemptioners, in case of alteration of a redemption law after a sale, came in for consideration.

As to the purchaser, it was held in 1892 that where the time to redeem lands from a tax sale had once expired, the purchaser

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[34] Moore v. Martin (1869), 38 Cal. 428.

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could not, by an amendatory law enlarging the time for redemption, be deprived of his absolute right to a deed;[35] in 1897, that an amendment to section 702 of the Code of Civil Procedure, reducing the premium to be added to the purchase price, in ascertaining the amount necessary to effect a redemption, from two per cent per month to one per cent per month, did not and could not apply to a redemption from a sale made before it took effect;[36] and in 1911, that the provision of a statute of 1906, that "any act or proceeding appointed, required or limited by or in pursuance of law to be performed or taken on any day or within any time in the month of June, 1906, prior to the last day of said month, may be performed or taken on any day not later than the 10th day of July, A. D. 1906, with the same effect as if it had been performed or taken on the day or within the time wherein such act or proceeding was so appointed, required or limited to be performed," cannot make effectual a redemption of land attempted July 9, 1906, from a sale made June 12, 1905, the law in force at the time of sale limiting the period of redemption to one year.[37] The redemption law in effect at the time of the sale enters into and becomes a part of the contract of the purchaser at the sale. As to redemptioners, it was held in 1897, that the right given the owner to redeem is a vested right, pertaining to the contract of purchase, and in reason and justice no more open to attack than that of the purchaser.[38] This conclusion, however, left out of account the provisions of section 327 of the Political Code, considered in the second division of this article, in connection with rights expressly made revocable.

Subsequent cases have held that the redemption of land sold at a tax sale is governed by the law in force at the time of sale: it cannot be affected by subsequent legislation.[39]

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[35] Rollins v. Wright (1892), 93 Cal. 395.

[36] Thresher v. Atchison (1897), 117 Cal. 73, 48 Pac. 1020, 59 Am. St. Rep. 159.

[37] Summers v. Hammell (1911), 17 Cal. App. 493, 120 Pac. 63.

[38] Teralta Land & Water Co. v. Shaffer, supra, n. 1. In Collier v. Shaffer (1902), 137 Cal. 319, 70 Pac. 177, however, the court held that the amendment prevailed in such a redemption, to the extent that it eliminated a clause of the original provision requiring the redemptioner to pay the County Auditor a fee of $2 for an estimate of the amount of redemption money necessary, on the ground that the legislature could relieve a party desiring to redeem from burdens in favor of the state.

[39] Collier v. Shaffer, supra, n. 38; Johnson v. Taylor (1907), 150 Cal. 201, 88 Pac. 903, 119 Am. St. Rep. 181, 10 L. R. A. (N. S.) 818.

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Even as to purchasers, however, a subsequent statute requiring the purchaser of land at a tax sale to give the former owner or the occupant of the land, not more than thirty days before the expiration of the period of redemption, thirty days' written notice of such expiration or of the time when he will apply for a deed of the land, and extending the period of redemption until the notice is given and the deed applied for, affects the remedy only and is therefore applicable to a redemption from a tax sale made before its enactment.[40] But a subsequent statute, abolishing the requirement of notice in case of the sale of property to the state for taxes, and making the period of redemption five years and until entry upon or sale of said land by the state, in lieu of one year and until the giving of such notice and the application for a deed, injuriously affects substantive rights of redemptioners, in that the period of redemption may end without notice to redemptioners, and, possibly, sooner than before, and therefore cannot apply to a redemption from a tax sale made before it took effect.[41]

The decisions thus far considered are all consistent with one another; but beginning in 1899, under the influence of a decision of the United States Supreme Court, rendered in 1896 on appeal from Kansas,[42] the State Supreme Court sharply limited, if it did not overrule, the old doctrine that a sale either with or without a right of redemption affords an adequate remedy. On the contrary, it held, in a series of cases where the amendment to section 702 of the Code of Civil Procedure, enlarging the period of redemption from six months to one year, was involved, that such amendment could not apply at all to a redemption from a sale made on the foreclosure of a mortgage made before the amendment took effect,[42a] nor to a redemption from an execution sale on a judgment rendered before it took effect,[43] notwithstanding such sales were made thereafter.

[40] Oullahan v. Sweeney (1889), 79 Cal. 537, 21 Pac. 960, 12 Am. St. Rep. 172.

[41] Johnson v. Taylor, supra, n. 39.

[42] Barnitz v. Beverly (1896), 163 U. S. 118, 41 L. Ed. 93, 16 Sup. Ct. Rep. 1042.

[42a] Savings Bank of San Diego County v. Barrett (1899), 126 Cal. 413, 58 Pac. 914; Haynes v. Treadway (1901), 133 Cal. 400, 65 Pac. 892, where the court further held that the fact that the land sold for more than sufficient to satisfy the mortgage debt and all its incidents, was immaterial; Tuohy v. Moore (1901), 133 Cal. 516, 65 Pac. 1107; Malone v. Roy (1901) 134 Cal. 344, 66 Pac. 313.

[43] Welsh v. Cross (1905), 146 Cal. 621, 81 Pac. 229, 106 Am. St. Rep. 63.

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It may be doubted, whether, in so deciding, the State Supreme Court correctly understood the import of the decision of the federal court in question. A Kansas statute was there involved which not only created a period of redemption of eighteen months' duration where theretofore there had been no right of redemption at all, but besides gave the judgment debtor during that period the right to continue in possession, and the absolute title to the rents, issues and profits, except as needed for repairs, and provided that, in case of a redemption by him, the land should thereafter be exempt from liability for any unpaid balance of the debt on which it was sold, or on any inferior lien the holder of which might have redeemed. In all these respects the Kansas statute went beyond anything ever contained in the California redemption law, which not only prescribes a shorter period of redemption, but, where a redemption is not effected, entitles the purchaser to receive from the tenant in possession, the rents of the property sold, or the value of the use and occupation thereof, and, where it is effected, makes no exemption. The United States Supreme Court, in holding the Kansas statute could not apply to a sale made on foreclosure of a mortgage executed before its passage, among other things, said:

> "It seems impossible to resist the conviction that such a change in the law is not merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract."

In a more recent decision, in 1904,[44] the United States Supreme Court pointed out that if a mortgagee claimed that subsequent legislation relating to rights of redemption impaired his contract and desired a sale without reference thereto, he should present such claim and desire to the court in which his mortgage was being foreclosed, and cause an appropriate provision to that effect to be inserted in the judgment; but that in the absence of such a provision, a third party purchasing at the sale could not be heard to say that the redemption law in force when the mortgage was made applied to him, because the subsequent legislation might be void as to some one else. "The some one else might waive its illegality, or consent to its enforcement, or the question might have no importance because

[44] Hooker v. Burr (1904), 194 U. S. 415, 48 L. Ed. 1046, 24 Sup. Ct. Rep. 706.

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the property sold for enough to pay the debt, even though there was an abstract impairment of the obligation of his contract."

Moreover, the State Supreme Court has not altogether followed the doctrine of its late decisions last referred to. The United States decision of 1904 was in affirmance of a decision of the California Supreme Court of 1902, wherein it was held that where a mortgage was executed before the amendment to section 702 of the Code of Civil Procedure reducing the premium to be paid on a redemption from two per cent per month to one per cent per month, and the property was sold to a third person after the amendment took effect, for more than enough to satisfy the mortgage debt in full, such purchaser cannot successfully urge that a redemption made by payment only of the amount required by the amended law was insufficient.[45]

The last group of cases under this head deals with statutes of limitation and kindred acts.

Statutes of limitation.—It is settled law that statutes of limitation relate to the remedy.[46] So long as not unreasonable, they do not impair contract obligations or other vested rights.[47]

Subject to the limitation that a reasonable time must be allowed for commencing an action or a proceeding after the passage of an act establishing or shortening a period of limitation, the constitutionality of statutes establishing or altering the period of limitation as to contracts and on vested rights then in force is beyond question.[48]

Similarly, the time for commencing an action or a proceeding may be extended.[49] A statute of 1850 defined the time for commencing civil actions, limited the time in cases of actions to recover real property, or of defenses based on title to real property, to five years, and said time ran from the passage of the act, April 22, 1850. By a statute of 1855 in effect from April 11, 1855, said sections were amended so that in case of a claim, derived from the Spanish or Mexican governments, to real property, the five years ran only from the time of the final confirma-

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[45] Hooker v. Burr, 70 Pac. 778, 99 Am. St. Rep. 17.
[46] Billings v. Hall (1857), 7 Cal. 1.
[47] Tuttle v. Block (1894), 104 Cal. 443, 38 Pac. 109.
[48] Doehla v. Phillips (1907), 151 Cal. 488, 91 Pac. 330.
[49] "A man has no vested right in the running of the statute of limitations." Swamp-Land District No. 307 v. Glide (1896), 112 Cal. 85, 44 Pac. 451.

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tion of such title by the United States. It was held that the claim that the right to the limitations fixed by the act of 1850 had become vested in those in possession of real property, and that, as against them, the period of limitation could not be extended by the latter act, could not be sustained.[50] Nevertheless, in a case where the owner of land caused the same to be conveyed to another by deed absolute, June 12, 1869, to secure certain advances then made by the grantee to him, both parties then being residents of and within New York state and neither of them then nor thereafter in actual possession of the land, and by the California laws of that time the right to redeem from a mortgage was barred when the demand secured by the mortgage was barred by limitations, and by the New York laws such demand was so barred November 20, 1874, and in 1872 the California Code of Civil Procedure was enacted to take effect January 1, 1873, section 346 providing:

> "An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor, or those claiming under him, against the mortgagee in possession, or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for five years after breach of some condition of the mortgage,"

it was held that section 346 was inapplicable to the transaction in question, and that an action to redeem, brought March 15, 1887, could not be maintained.[51]

In 1857, Chief Justice Murray said that since statutes of limitation affect only the remedy, and do not destroy the right, the legislature may by a repeal of such a statute revive a right which has not been extinguished but has been held in abeyance for want of a remedy to assert it; and distinguished cases from Louisiana and Texas on the ground that the doctrine of prescription there prevailed, which differed from the doctrine of limitations, in that the former confers a right, the latter takes away a remedy.[52] Section 1007 of our Civil Code, however, adopts the doctrine of prescription. Thus whatever view be taken

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[50] Billings v. Hall, supra, n. 46.

[51] Allen v. Allen (1892), 95 Cal. 184, 30 Pac. 213, Beatty, C. J., dissenting, and among other things saying: "A law enlarging the period of limitations upon existing contracts is not a retroactive law, and it impairs no vested right."

[52] Billings v. Hall, supra, n. 46.

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of the correctness of the remarks of the Chief Justice (a question on which decisions in other states are not unanimous), in view of the code section, there is no doubt that it is now the law, as held in subsequent cases, that when a limitation on a right of action has once fully run, a subsequent repeal of the statute of limitation cannot be given the effect of re-establishing the right of action.[53] Thus where section 321 of the Code of Civil Procedure, as originally enacted, provided that in every action for the recovery of real property the legal title should prevail unless "the property has been held and possessed adversely to such legal title, for five years before the commencement of the action," and sections 322-326 defined the elements of adverse possession, one who, during the time that such provisions were in effect, had an adverse possession of land that fulfilled all the statutory requirements, thereby acquired a perfect title to such land; and notwithstanding he had not paid taxes on such land during the prescriptive period, the legislature, by the later amendment to section 325 adding the further prerequisite to adverse possession that the adverse claimant have paid all taxes on the land during the prescriptive period, did not have power to bring his title in question.[54]

Finally, as already suggested, the time allowed by statutes of limitation must be reasonable: a statute cannot be so applied as to deprive a person of all remedy, nor so as to unreasonably restrict him in availing himself of the remedy which is given.[55] "It has been often held that a limitation to one year, and even to six months, is not unreasonable, and does not impair the obligation of the contract nor deprive the obligee of an adequate remedy."[56] In 1850 the statute defining the time for commencing civil actions, prescribed a limitation of five years for "an action upon a judgment or decree of any court of the United States, or of any state or territory within the United States." In 1855 the legislature shortened the limitation to two years. It was

[53] Swamp Land District No. 307 v. Glide, supra, n. 49; Peiser v. Griffin (1899), 125 Cal. 9, 57 Pac. 690; Weldon v. Rogers (1907), 151 Cal. 432, 90 Pac. 1062.

[54] Sharp v. Blandenship (1881), 59 Cal. 288, 8 Pac. Coast L. J. 643.

[55] Hibernia Savings & Loan Soc. v. Jordan (1880), 2 Cal. Unrep. Cas. 79, 5 Pac. Coast L. J. 381, judgment reversed on rehearing, under name, Hibernia Savings & Loan Soc. v. Hayes (1880), 56 Cal. 297, 7 Cal. Unrep. Cas. 398, 6 Pac. Coast L. J. 686.

[56] Tuttle v. Block, supra, n. 47.

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held that the amendatory act could not be applied so as to bar an action, brought October 12, 1856, upon an Ohio judgment rendered October 6, 1853: it must be construed as applying only to judgments not in esse at the time of its passage, or as giving two years from its passage upon judgments not then barred.[57]

Extending time wherein execution may issue.—At the time a certain money judgment was rendered, section 685 of the Code of Civil Procedure did not permit a money judgment to be enforced after five years from its entry, but before the five year period had fully run on this money judgment the section was so amended as to provide that on all money judgments theretofore rendered, upon which the limitation had not yet fully run, and upon all money judgments thereafter to be rendered, process might issue after the five year period by leave of court on motion, or by judgment for that purpose founded upon supplemental pleadings. It was held that there could be no doubt of the constitutional power of the legislature to apply the amendment to the judgment in question.[58]

Changing time to claim mechanic's lien.—Where in 1887 section 1187 of the Code of Civil Procedure was so amended that the thirty day period within which a lien for materials bestowed in the construction of an unfinished building upon which work had ceased for thirty days ran at once, instead of from the final completion of the building, the amended section applied to a materialman who had already bestowed a part of the materials he had contracted to bestow at the time the amendment took effect, and a lien claimed by him within thirty days after the final completion of the building, and not within thirty days after the thirty days' cessation, was void.[59]

Extending time to file claim on contractor's bond.—An amendment enlarging from thirty days to ninety days the time within which after completion of any public work a person furnishing any labor, materials, or supplies in the performance of the work and seeking recourse on the bond of the contractor for payment for such work, must file with the public authority by which the

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[57] Scarborough v. Dugan (1858), 10 Cal. 305.
[58] Weldon v. Rogers, supra, n. 53; Doehla v. Phillips, supra, n. 48.
[59] Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead (1890), 85 Cal. 80, 24 Pac. 648.

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contract was let, a verified statement of his claim, and enlarging from ninety days to six months the time within which after filing his claim the claimant might commence his action on his claim, applies to a claim on a bond given before the passage of the amendatory act for payment for work not completed until after it took effect,[60] or for materials supplied after such time.[61]

Limiting time to present claim against decedent's estate.—The provision of section 1493 of the Code of Civil Procedure that,

> "If a claim (against a decedent's estate) arising upon a contract heretofore made (by the decedent), be not presented (to his executor or administrator) within the time limited in the notice (to creditors), it is barred forever, except as follows: If it be not then due, or if it be contingent, it may be presented within one month after it becomes due or absolute,"

is not unconstitutional as unreasonably limiting and restricting the time to present his claim of a claimant whose claim did not become due until after the expiration of the time limited in the notice to creditors.[62]

And where the time to present a claim on a contract demand secured by mortgage had, under said provision, expired before section 1500 of the Code of Civil Procedure was amended so as to permit, in certain cases, without such presentation, an action to foreclose a lien or mortgage against property of a decedent's estate subject thereto, the latter amendment could not restore the claim to validity: the bar had become a vested right.[63]

Limiting time to assert title to land purchased at tax sale.—Where the time to redeem certain land from a sale for delinquent taxes expired December 1, 1875, without a redemption having been made, and under the law then prevailing the purchaser was entitled thereafter, without any limitation of time, to demand a deed of the land from the tax collector, but by a statute of 1885 he was required to get his deed within one year and three months or relinquish all rights, and the purchaser in question demanded a deed for the first time more than six months after

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[60] Asbestos Mfg. & Supply Co. v. American Bonding Co. (1914), 25 Cal. App. 641, 145 Pac. 107.

[61] American Radiator Co. v. American Bonding Co. (1915), 27 Cal. App. 685, 151 Pac. 168.

[62] Supra, n. 55.

[63] Supra, n. 55.

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the said period of limitation had expired, the amended provision applied to his case, and he was not entitled to the deed.[64]

3. PARTICULAR CHANGES IN REMEDIAL RIGHTS AS IMPAIRING VESTED RIGHTS.

Providing additional mode of contesting application to purchase state land.—In 1901, defendant made application by affidavit pursuant to section 3443 of the Political Code to purchase certain state land. Under the law then prevailing his right to purchase was open to question at any time prior to the issuance of patent through a contest initiated in a superior court on the demand of any other applicant to purchase the same land, and doubtless also through an action brought for that purpose by the state. In 1903, this section was amended so as to provide that if it was made to appear to the surveyor general by counter affidavit that when the application to purchase was made the counter affiant or those under whom he claims had been in the actual possession of said land or any part thereof for farming purposes for ten years next prior to said application and had reclaimed and cultivated the same, or that the affidavit of the applicant was false in any material particular, the surveyor general must refer the question so raised to a certain superior court for adjudication according to a procedure outlined. It was held that this amendment affects the remedy only, and may properly be invoked for determining the validity of the application in question, without violating any constitutional guaranty.[65]

Providing additional mode of terminating right to purchase state land.—A statute,[66] enacted in 1867, provided for the sale of school lands at one dollar and twenty-five cents per acre, "payable twenty per cent . . . . within fifty days from the date of the certificate of location issued to the purchaser by the surveyor general; the balance, bearing interest at the rate of ten per cent per annum in advance . . . . within one year after the passage of any act of the legislature requiring such payment,

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[64] Tuttle v. Block, supra, n. 47.

[65] Boggs v. Ganeard (1906), 148 Cal. 711, 84 Pac. 195, the court saying: "A change in the law to this extent affects only the remedy, and disturbs or impairs no existing legal right. . . . . Having the right to provide for the inquiry as to whether the claim of the applicant is valid in such manner as it sees fit, subject to the limitation as to impairment of vested rights, the state may authorize such an inquiry to be instituted and maintained by any officer or person or class of persons."

[66] Cal. Stats. 1867, p. 415.

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or before, if desired by the purchaser;" for the preparation and forwarding annually to the District Attorney of each county of a list of all lands in his county upon which "payments have not been made according to law;" that upon receipt of the delinquent list, the District Attorney, after fifty days' notice by publication in a newspaper, shall commence an action for strict foreclosure of the interests of all purchasers who have not in the meantime paid the amounts owing by them with costs of publication, and that by making payment of the amount due the state and of all costs, within twenty days after entry of judgment of foreclosure, any purchaser may redeem. In 1889 it was provided that whenever the holder of a certificate of purchase of state lands, issued before March 27, 1872, had failed to pay for five years "arrears of principal or of interest due to the state for said land, and the state shall . . . . have issued a certificate of purchase for the same land, or any part thereof, to a subsequent purchaser, then, unless the holder . . . . of such prior certificate shall pay the entire residue of the interest remaining unpaid for such purchase within six months from and after the passage of this act, such holder . . . . shall be deemed to have lost all right to the land . . . . or to complete the purchase of such land, and all moneys heretofore paid to the state . . . . on such purchase shall be deemed . . . . forfeited to the state." Pursuant to the act of 1868, the initial payment of twenty per cent on the purchase price of certain school lands was paid in July, 1869, the certificate of purchase issued, and interest paid to January, 1873; but no further sum was paid or tendered on account of the purchase until 1911. Meanwhile, in December, 1886, a certificate of purchase for the same lands was issued to another purchaser, who completed his purchase in 1911. In this situation, the application to the first purchaser and his assignee of the act of 1889, and consequent termination of their right to purchase and forfeiture of payments made and of all right to the lands, does not impair the obligation of any contract. It is no ground for complaint that the state has established a new method of declaring a forfeiture different from that authorized by the act of 1868, especially as the later act is more liberal than the earlier in that it gives a longer period of redemption.[67]

[67] Aikins v. Kingsbury (1915), 170 Cal. 674, 151 Pac. 145.

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Requiring additional notice of sale by the state of land sold to it for taxes.—The 1905 amendment to section 3897 of the Political Code, requiring that in case of the sale by the state of land sold to it for taxes, the tax collector authorized to make the sale must, in addition to the notice of such sale theretofore required by said section to be given by such tax collector by publication, also mail a copy of said notice with postage prepaid to the last person to whom the land had been assessed, if his address is known, is applicable to a sale of such land made after the amendment took effect, although the sale was authorized and notice published before it took effect.[68]

Giving or taking away a right of personal action on a local assessment.—The San Francisco Consolidation Act, in reference to local assessments for street work, in addition to a remedy for the enforcement of the assessment lien, provided in section 59 that an action could be maintained by the contractor for work done and materials furnished at street crossings against the several owners liable therefor. Afterwards this section was repealed. Subsequently the provisions of the Consolidation Act were revised, and the revisory act allowed a personal judgment against the owner of property assessed, in actions for the foreclosure of the assessment liens.

While section 59 was in force certain street work was done in San Francisco under contract therefor, and while the act of 1861 was in force certain other street work was done. To pay for each a local assessment was levied, but in each case the respective enactment was repealed as above set forth before the collection of the assessment. It was held that the first contractor, notwithstanding the repeal of section 59, could maintain the action authorized thereby: to withdraw the personal liability would impair the obligation of his contract pro tanto.[69] On the other hand, the second contractor could not avail himself of the personal recovery authorized by the act of 1862:

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[68] Buck v. Canty (1912), 162 Cal. 226, 121 Pac. 924, the court saying: "The amendment simply affects a change in the method by which the right may be exercised; a change in the remedy whereby additional opportunity is given to the former owner before an actual sale to regain his property by redemption without impairing the right of the state to proceed to sell in case he does not."

[69] Creighton v. Pragg (1862), 21 Cal. 115.

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such a recovery could not be had on a contract made while the act of 1861 was in force.[70]

Changing rules of evidence.—It is said that it is competent for the legislature at any time to change or modify the rules of evidence and the degree of proof and make such alterations applicable to pending cases.[71]

Section 1880 of the Code of Civil Procedure, which as amended, went into effect in 1874, provided that "parties to an action or proceeding, or in whose behalf an action or proceeding is prosecuted, against an executor, or an administrator, upon a claim or demand against the estate of the deceased" could not be witnesses. Before the enactment of such amendment there was no such disqualification to testify. An action against the executors of a decedent's estate was commenced June 9, 1873, upon a rejected claim against the estate, but was not brought to trial until July 30, 1874. The amendment applied, and it was error to admit in evidence the plaintiff's deposition, taken October 10, 1873.[72]

The California statutes nowhere declaring that the destruction of a will without intent to revoke or by accident operates to revoke the will, and the procedure for the probate of wills being established only to furnish an exclusive mode for the settlement of all disputes concerning the execution of wills and conclusive evidence of their contents, and not being the foundation of the rights of those claiming under wills nor having the effect of bringing wills admitted to probate into legal existence, the heirs of a decedent who died while it was in force have no vested right in section 1339 of the Code of Civil Procedure, providing as enacted 1872, that,

> "No will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses;"

accordingly where after the death of the testatrix, and the filing

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[70] Creighton v. Manson (1865), 27 Cal. 614.

[71] Himmelman v. Carpentier (1873), 47 Cal. 42; (rules of evidence); Mitchell v. Haggenmeyer (1875), 51 Cal. 108, (rules of evidence); In re Patterson's Estate (1909), 155 Cal. 626, 102 Pac. 941, 132 Am. St. Rep. 116, (rules of evidence and degree of proof).

[72] Mitchell v. Haggenmeyer, supra, n. 71.

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of the petition for the probate of her will, section 1339 was amended so as also to permit the proof of a lost or destroyed will where it is shown to have been "by public calamity destroyed in the lifetime of the testator, without his knowledge," and it appeared that her will was destroyed in her lifetime in the great San Francisco fire of April 18, 1906, without her knowledge, the will was rendered capable of proof and probate.[73]

It also appears that the legislature is authorized to give the official papers of public officers the effect of prima facie evidence of designated facts. A statute directing that in civil actions to recover taxes, the delinquent tax lists, duly certified, shall be evidence to prove the delinquency of the tax, the property assessed " and that all the forms of law in relation to the levy and assessment of such taxes have been complied with" is not open to constitutional objection.[74]

It has also been held that an action to collect a local assessment brought while a statute was in force giving certain weight to the record of the assessment as evidence, is to be governed by this statute, and not by the presumptions created by a statute which was in existence when the work was done.[75]

Prior to 1872 an undivided interest in certain lands had been conveyed to husband and wife. Both under the statute in effect before the enactment of the code and under the codes as enacted 1872 the Supreme Court many times held that in the absence of clear and convincing proofs that property acquired by husband or wife after marriage was acquired in such way as to make it separate property, or was taken in exchange for separate property, it was presumed to be community property. Prior to 1889, the Civil Code read that: "All other property acquired after marriage by either husband or wife, or both, is community property." In 1889 this was amended by the addition of the following:

> "but whenever any property is conveyed to a married woman by an instrument in writing, the presumption is that the title is thereby vested in her as her separate property. And in case the conveyance be to such married woman and her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her as tenant in common, unless a different intention is expressed in the

[73] In re Patterson's Estate, supra, n. 71.
[74] People v. Seymour (1860), 16 Cal. 332.
[75] Himmelman v. Carpentier, supra, n. 71.

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> instrument, and the presumption in this section mentioned is conclusive in favor of a purchaser or incumbrancer in good faith and for a valuable consideration."

The court held that the rule declared by the amendment was more than a rule of evidence, that it was a rule of property, that the legislature did not have the power to apply it so that it would be retroactive and in effect disturb titles already vested, and that the changed presumption did not apply to the ownership of the undivided interest in question.[76]

Awarding specific relief in certain cases.—Where the Specific Contract Act,[77] provided that,

> "In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether the same be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein;"

and required the sheriff to collect on execution in satisfaction of a judgment only the kind of money specified therein, it was held that there was no constitutional objection to the application of the provisions of the act in an action brought after the passage thereof on a note executed prior thereto in view of the fact that the act was purely remedial.[78]

Changing the right to, or effect of, an appeal.—Article 6, section 4½, of the state constitution, forbidding a court to set aside a judgment or grant a new trial unless of opinion that the error complained of resulted in a miscarriage of justice, affects the remedy only. While originally applicable only in criminal cases, it now applies in all cases, including civil appeals to the supreme court then pending, although submitted prior to its adoption.[79] "A party has no contractual or vested right to have a judgment reversed because of an error which the court cannot say has produced what that section describes as a 'miscarriage of justice'. . . . Doubtless the people could, by constitutional

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[76] Jordan v. Fay (1893), 98 Cal. 264, 33 Pac. 95.
[77] Cal. Stats. 1863, p. 687.
[78] Carpentier v. Atherton (1864), 25 Cal. 564; Galland v. Lewis (1864), 26 Cal. 47.
[79] Vallejo & Northern R. R. Co. v. Reed Orchard Co. (1915), 169 Cal. 545, 147 Pac. 238.

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amendment, abolish the right of appeal and require the dismissal of appeals remaining undetermined."[80]

Exemptions.—By the earliest practice in this state, property of municipal corporations, whether unimproved lands owned by them, municipal buildings, or other property, having been subject to sale on execution for municipal debts, a law passed in 1851 exempting from sale on execution all property of San Francisco city necessary for municipal purposes, was void as against one who at the time of the passage of the act was owner and holder of subsisting unpaid indebtedness of the city, as impairing the obligation of his contract with the city.[81] In reaching this conclusion, Chief Justice Murray, speaking for the court, said:

> "There is, I think, no well-defined middle ground between holding that none of the debtor's property can, by a subsequent law, be withdrawn from the reach of the creditor, or else, admitting that the whole of his estate may be exempted from sale on execution . . . . Such property as was subject to execution at the time the debt was contracted must remain subject to execution until the debt is paid. As to future obligations, the legislature may make the exemption as broad as it pleases. It may abolish credit altogether, but it cannot legislate backward, and annul the force of prior obligations."

On the other hand, in a case where at the time that the debt was incurred no right to sue a county existed, but later this right was given by statute, it was held that the execution issued in a suit under this statute was subject to exemptions created by a statute passed prior to the statute conferring the right to sue.[82]

Limiting right to abandon certain condemnation proceedings.—The amendment in 1909 to the City Street Improvement Act of 1903, whereby the right of a city to abandon a condemnation proceeding instituted by it under the act was limited to abandonment before the entry of interlocutory judgment in such proceeding, instead of being authorized, as before, at any time before the payment of the compensation for the property condemned, is properly applied to a condemnation proceeding brought by Los Angeles city and pending at the time the amendment took effect, in which interlocutory judgment was not rendered until almost

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[80] Supra, n. 79.
[81] Smith v. Morse (1852), 2 Cal. 524.
[82] Gilman v. Contra Costa County (1857), 8 Cal. 52, 68 Am. Dec. 290.

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nine months after the amendment took effect, and so applied does not violate any constitutional right.[83]

Annexing right to interest to past due demands.—The legislature has power to impose on all debtors interest from the date of the legislation imposing it, by way of compensation for the delay in the payment of money already due. Thus under section 1369 of the Civil Code, providing that "Legacies bear interest from the time when they are due and payable, except that legacies for maintenance, or to the testator's widow, bear interest from the testator's decease," where certain specific legacies had become due and payable before the code took effect, they bear interest from the time it took effect, though before the enactment of the code interest was not allowable on legacies.[84]

IV. Particular Remedial Rights as Essential.

Injunctive relief in certain cases.—Should the statute[85] passed in 1903, declaring, among other things, that no restraining order nor injunction shall be issued with relation to any agreement, combination, or contract to do or procure to be done, or not to do or procure not to be done, any act in contemplation or furtherance of any trade dispute between employers and employees within the state, be construed as undertaking to render a court powerless to grant a restraining order or injunction enjoining one from obstructing another in the conduct of the latter's business by stationing pickets, carrying placards and the like with the words "unfair," "please don't patronize," and the like, upon them, in the immediate vicinity of the latter's place of business, or intimidating the latter's employees or customers, such act would to that extent be void as violating inalienable rights of property.[86]

Civil action against decedent's estate.—It seems that presentation to the executor or administrator, as authorized by the Code of Civil Procedure, is, in the first instance, a sufficient remedy on

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[83] Title Ins. & Trust Co. v. Lusk (1911), 15 Cal. App. 358, 115 Pac. 53, the court saying: "This section affects a remedy as distinguished from a right. . . . . It cannot . . . . be said that this section unreasonably impaired the remedy in the case under consideration."

[84] Dunne v. Mastick (1875), 50 Cal. 244.

[85] Cal. Stats. 1903, p. 289.

[86] Goldberg Bowen & Co. v. Stablemen's Union (1906), 149 Cal. 429, 86 Pac. 806, 117 Am. St. Rep. 145, 8 L. R. A. (N. S.) 460, 9 Ann. Cas. 1219; Pierce v. Stablemen's Union (1909), 156 Cal. 70, 103 Pac. 324.

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a claim against a decedent's estate.[87] Thus section 1500 of the Code of Civil Procedure as enacted 1872 provided that,

> "No holder of any claim against an estate shall maintain any action thereon, unless the claim is first presented to the executor or administrator, except in the following case: An action may be brought by any holder of a mortgage or lien to enforce the same against the property of the estate subject thereto, where all recourse against any other property of the estate is expressly waived in the complaint."

This was amended in 1873 by eliminating the exception therefrom, thereby requiring presentation in every case. It was said by certain justices that this amendment did not divest any vested right of a mortgagee, but related to his remedy only, and could be applied in every case.[88]

Remedies of creditors of corporations.—The fact that the only notice required, in case of proceedings for the voluntary dissolution of corporations is by publication in a newspaper of the county not less than thirty days nor more than fifty days, or if there is no newspaper, then by posting in three of the principal public places of the county, does not render such proceedings void as restricting the opportunity of creditors of corporations thereby dissolved to recover and impairing the obligation of contracts. Section 400 of the Civil Code provides:

> "Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved, and have full power to settle the affairs of the corporation."

The debts of a corporation are not vacated by its dissolution.[89]

V. Particular Remedial Rights as Subversive of Inalienable Rights.

Awarding counsel fees in certain cases.—That portion of section 1195 of the Code of Civil Procedure, providing with reference to actions to foreclose the liens of mechanics and others that,

> "The court must also allow, as a part of the costs, ... reasonable attorney's fees in the superior and supreme courts, such . . . . attorney's fees to be allowed to each lien claimant whose lien is established, whether he be plaintiff or defendant,

[87] Supra, n. 55.
[88] Supra, n. 55.
[89] Crossman v. Vivienda Water Co. (1907), 150 Cal. 575, 89 Pac. 335.

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or whether they all join in one action or separate actions are consolidated,"

violates inalienable rights of property.[90]

Charles M. Bufford.

San Francisco, California.

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[90] Builders' Supply Depot v. O'Connor (1907), 150 Cal. 265, 88 Pac. 982, 119 Am. St. Rep. 193, 17 L. R. A. (N. S.) 909, 11 Ann. Cas. 712.

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Elizabeth Josselyn Boalt—
An Appreciation

ELIZABETH JOSSELYN BOALT, widow of John Henry Boalt, died at Santa Barbara on Saturday, February 10, 1917. A telegram from eastern friends, read at her funeral, contains this tribute to her worth and character: "As lifelong friends of Elizabeth Josselyn Boalt we send this message of love and sorrow, together with our gratitude for the blessed course and peaceful end of a sweet, strong, unselfish, patient, victorious, and helpful earthly life which is now continued in the world invisible."

These expressions of appreciation have a peculiarly vivid

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meaning to those who know the details which give them their just foundation.

Judge Boalt's death in 1901 had taken from his wife the companionship of one who had so impressed Robert Louis Stevenson that he said of him that he was "the finest type of the American gentleman he had ever met." The untimely death of their much beloved and only daughter—a woman of great beauty and charm—had been a very severe blow to them both, a blow from which Judge Boalt never recovered.

A little granddaughter remained to Mrs. Boalt, and upon this child she centered her affections. It was when this little girl of ten—the last descendant of their line—was taken away and Mrs. Boalt was left as it were utterly alone, that she wrote me from Europe these words: "I shall not wear my sorrows on my sleeve. My tears shall be shed in the privacy of my own closet. I shall not, during my remaining years, cast a gloom over the happiness of those about me."

Hundreds of friends on two continents can bear witness that Mrs. Boalt lived out her days in strict fidelity to the courageous philosophy which she thus expressed.

She recognized that the best earthly anodyne for sorrow is to be found in mental occupation. She had been an accomplished pianist in her younger days and she turned again to her music. Although some sixty years of age she enrolled in Vienna as a pupil of the celebrated Leschetizky and devoted much time each day to her work. In Rome and Florence she added Italian to her knowledge of German and French.

Like Judge Boalt she found congenial companionship in the society of artists, musicians, and literary people. She traveled extensively, occasionally making long stops in the cities both of Europe and America, where she could enjoy the world's best music with friends who, like herself, were music lovers.

Mrs. Boalt did not talk of her sorrows. On the contrary she radiated cheerfulness and made the world sunnier and brighter for those about her. While she spoke without hesitation in conversation with friends, of her husband, her daughter and her grandchild, this was never attended by a suggestion of selfish grief or pent up emotion. And yet to more than one who knew her well, she has unconsciously betrayed by a pressure of the

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hand, or a turning away of the head when some chord was touched, the weight of the burden which she was carrying in her heart.

Elizabeth Josselyn Boalt was born in Hanover, Massachusetts, on the 30th day of June, 1842. Her musical education was completed in Europe. On July 31, 1866, she was united in marriage with John Henry Boalt at Waverly, Massachusetts. More than thirty years ago a mutual friend told me that the Judge and Mrs. Boalt were the real hero and heroine of Howells' charming novel, "The Lady of the Aroostook,"—that she and the Judge had first met on a clipper ship when she, as Elizabeth Josselyn and just out of her teens, was on her way to Europe for music, while the Judge, then a young man of about twenty-four, was sailing toward Freiberg to complete his studies as a mining engineer.* A few years since I taxed Mrs. Boalt with this romance and she laughingly and almost bashfully admitted that the clipper-ship part of the story was true enough and that friends were said to have told the story to Howells and thereby to have suggested the plot of his novel; but she added that whether or not he had actually made use of it, she really could not say.

In 1867 Judge Boalt took his bride to Nevada, where they lived until 1871. It was during this time that he occupied the bench of a District Court of Nevada. In 1871 the family moved to Oakland, California, and Judge Boalt entered the practice of the law in San Francisco. They were still living in Oakland at the death of Judge Boalt in 1901, but later on Mrs. Boalt took up her residence in San Francisco, and she still considered San Francisco her domicile at the time of her death.

In 1906 she gave property to the value of one hundred thousand dollars for the erection of the Boalt Memorial Hall of Law. In the same year she created a further trust whereby, subject to a life estate and certain powers of revocation, she transferred substantially all of her remaining estate "to establish and endow a professorship in the Department of Jurisprudence in the University of California, to be known as the 'John H. Boalt Professorship of Jurisprudence.'"

* Judge Boalt's knowledge of mines was of much value to him later in his legal work in mining cases both in Nevada and California.

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In 1912, sometime after the erection and dedication of the Boalt Memorial Hall of Law, Mrs. Boalt modified the foregoing provision by permitting a latitude as to the precise chair or professorship so to be established and endowed with the trust fund. By this modification the fund is to remain as a permanent endowment "for such chair or chairs as my said trustees, or their successors, may designate and determine, or, in lieu of such designation, as the said Board of Regents shall determine." And it is further provided that in the discretion of the trustees, or of the Board of Regents, the whole or a part of the endowment may go for or toward "the salary of such person as shall, from time to time, be the Dean of the Faculty of the Department of Jurisprudence." This endowment will approximate two hundred thousand dollars.

It is gratifying to note that in the instrument of the 15th of March 1912, Mrs. Boalt thus expresses herself: "I desire here to record the pleasure and satisfaction that I have found in having contributed to the construction of the Boalt Memorial Hall of Law."

While her public benefactions are well known, Mrs. Boalt guarded from the knowledge of the world her very many acts of private kindness as jealously as she concealed her personal sorrows. It is perhaps enough to say, even now, in this regard that to the knowledge of the writer many persons to whom life has proved a struggle have been helped and encouraged by Mrs. Boalt in very practical and substantial ways. This is particularly true among artists, musicians, and writers of her acquaintance.

She felt that through the medium of the work which would be accomplished for State and Nation within the walls of the Boalt Memorial Hall of Law the ideals of her distinguished husband would live on and on. It is perhaps not too much to say that in the splendid spirit of fortitude shown by Mrs. Boalt in the last twenty years—a fortitude to which she was undoubtedly aided by her husband's sound philosophy of life—the character of Judge Boalt found a memorial even more beautiful than any which it was in the power of architecture to erect.

Charles S. Wheeler.

San Francisco, California.

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Comment on Recent Cases

ACT TO REGULATE COMMERCE: LONG AND SHORT HAUL CLAUSE: JUDICIAL REVIEW OF ORDERS OF INTERSTATE COMMERCE COMMISSION.—The United States Supreme Court has held in numerous cases that the Interstate Commerce Commission has virtually irreviewable discretion in administering the Act to Regulate Commerce within the limits fixed by the constitution and the statutes.[1] In the Intermountain Rate Cases, (United States v. Atchison, Topeka & Santa Fe Railway Company),[2] it was ruled that the 1910 amendment to the fourth section of the act (long and short haul clause)[3] transferred from the carriers the primary function of determining whether lower rates might be made for longer than for shorter hauls, displacing the mere reviewing power previously reposed in the Commission. It was further pointed out that the authority conferred upon the Commission to prescribe the extent to which relief from the restraints of section 4 might be given, comprehends the authority to fix the relationship between the rates to the more distant and the intermediate points. In the case of *United States v. Merchants' and Manufacturers' Traffic Association of Sacramento et al.*[4] the Supreme Court finds it necessary to reapply these principles, and in so doing reverses the decision of the District Court of the United States for the Northern District of California.[5]

In the Spokane[6] and Reno[7] cases, the Interstate Commerce Commission granted relief from the restraints of the long and short haul clause on west-bound transcontinental traffic, but attached as a condition to that relief a requirement that rates to intermediate points, such as Reno and Spokane, should not exceed

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[1] Baltimore & Ohio R. R. Co. v. U. S. (1910), 215 U. S. 481, 495, 54 L. Ed. 292, 297, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Delaware, L & W. R. R. Co. (1911), 220 U. S. 235, 251, 55 L. Ed. 448, 456, 31 Sup. Ct. Rep. 392; Interstate Commerce Commission v. U. P. R. R. Co. (1912), 222 U. S. 541, 547, 56 L. Ed. 308, 311, 32 Sup. Ct. Rep. 108; Interstate Commerce Commission v. Louisville & N. R. R. Co. (1913), 227 U. S. 88, 92, 57 L. Ed. 431, 433, 33 Sup. Ct. Rep. 185; Atchison, T., & S. F. Ry Co. v. U. S. (1914), 232 U. S. 199, 221, 58 L. Ed. 568, 34 Sup. Ct. Rep. 291; Los Angeles Switching Case (Interstate Commerce Commission v. Atchison, T., & S. F. Ry Co.) (1914), 234 U. S. 294, 58 L. Ed. 1319, 34 Ct. Rep. 814. See 3 California Law Review, 50.

[2] (1914), 234 U. S. 476, 58 L. Ed. 1408, 34 Ct. Rep. 986. See 2 California Law Review, 491.

[3] 36 Stats. at L. 539, 547, amending section 4 of the Act to Regulate Commerce (24 Stats. at L. 380, 104).

[4] (Dec. 4, 1916), 242 U. S. 178, 37 Sup. Ct. Rep. 24.

[5] Merchants' & Manufacturers' Traffic Association of Sacramento v. U. S. (1915), 231 Fed. 292.

[6] City of Spokane v. Northern Pac. Ry. Co. (1911), 21 I. C. C. 400.

[7] R. R. Commission of Nevada v. S. P. Co. (1911), 21 I. C. C. 329.

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by more than certain fixed percentages the rates concurrently in effect to Pacific Coast terminals. The validity of the Commission's action was attacked by the carriers but sustained by the Supreme Court in the Intermountain Rate Cases.[8] Immediately following the decision vindicating the Commission's authority, the carriers made application for a modification of the initial order, with a view to securing additional relief made necessary by the intensified competition of water carriers operating through the Panama Canal. After due hearing certain additional relief was granted by the Commission,[9] which, however, so restricted its grant as to allow a full measure of relief only as to rates to ports of call. A lesser measure of relief was permitted as to rates to intermediate points not directly served by the water lines. The necessary effect of this order was to eliminate from the list of Pacific Coast terminals enjoying water-compelled rates one hundred and eighty-five "interior terminals" which had been upon a parity with the water terminals proper. The commercial interests of Sacramento, Stockton, San Jose, and Santa Clara, which were among the cities thus deprived of the rate advantages which they had previously enjoyed, challenged the Commission's order upon the ground that it was not responsive to the application filed by the carriers under section 4, and therefore, represented an excess of jurisdiction. The lower federal court sustained this contention, holding that the relief granted be immediately responsive to that applied for, and that, inasmuch as the carriers had sought authority to maintain lower rates to all points then known as terminals than to intermediate points, the Commission could not competently restrict the relief granted to a limited number of the points involved and thereby impel the establishment of higher rates to the remainder. The Supreme Court, in reversing the District Court, points out that the broad discretion enjoyed by the Commission would be rendered nugatory if the courts were permitted so narrowly to construe the Commission's authority.

It would seem clear that the Commission is not restricted to the mere alternatives of approving or disapproving applications for relief under section 4 in the form in which they are presented. The express grant of power to prescribe the extent of relief in specified cases comprehends the power to grant relief as to certain points and deny it as to others, and to impose such conditions as administrative discretion may suggest. The circumstance that a readjustment of rates not contemplated by the carriers' application may result from the Commission's order does not go to the question of power.

J. L. K.

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[8] Supra, n. 2.

[9] Commodity Rates to Pacific Coast Terminals and Intermediate Points (1915), 32 I. C. C. 611, 34 I. C. C. 13.

[10] Supra, n. 5.

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CONFLICT OF LAWS: LEGITIMACY: SUCCESSION.—What law should determine who are children under a statute of succession? According to *Wolf v. Gall*[1] it is the law of the situs of the realty.

In the principal case the paternal grandmother of children born out of wedlock, whose natural father was domiciled outside of California, died intestate possessed of real property in this state. The court decided that as the subsequent marriage of the parents of such children would work a legitimation by virtue of section 215 of the Civil Code, the marriage of the natural parents constituted a legitimation for the purpose of succession under section 1386 of the Civil Code. The court declared that while it is generally true that the laws of one state or country have no extra-territorial effect, on the other hand, when the status of a person is under consideration before the courts of this state in questions of succession, they will apply our own statutes in determining the status of the claimant to the succession; and if the claimant shows that by applying our law he is entitled to take as a legitimate child it is sufficient, and the fact that by the law of his own country he is not legitimate is immaterial.

While it is undisputed that the lex rei sitae governs the succession to or disposition of immovables,[2] the general rule is that the law of the father's domicile should be the proper law to determine legitimation for the purposes of succession to the father's property under a statute of the situs.[3] Thus where the act or event working a legitimation by the lex rei sitae does not constitute a legitimation by the law of the father's domicile, the children born out of wedlock are not generally considered legitimated for the purposes of inheriting realty as the legitimate children of the

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[1] (Dec. 9, 1916), 23 Cal. App. Dec. 910; rehearing denied, Feb. 7, 1917.

[2] Hall v. Gabbert (1904), 213 Ill. 208, 72 N. E. 806; Olmstead v. Olmstead (1909), 216 U. S. 386, 54 L. Ed. 530, 30 Sup. Ct. Rep. 292; Dicey Conflict of Laws (2d ed.), p. 504; Tiedeman, Real Property (2d ed.), § 644; 3 Washburn, Real Property (4th ed.), §32.

[3] Dayton v. Adkisson (1889), 45 N. J. Eq. 603, 17 Atl. 964, 14 Am. St. Rep. 763, 4 L. R. A. 488; De Wolf v. Middleton (1895), 18 R. I. 810, 26 Atl. 44, 31 Atl. 271, 31 L. R. A. 146; 1 Wharton, Conflict of Laws, (3d ed.), p. 552. See note in 65 L. R. A. 177. Contra: Sneed v. Ewing (1831), 5 J. J. Marsh, 460, 22 Am. Dec. 41.

In Blythe v. Ayres (1892), 96 Cal. 532, 31 Pac. 915, 19 L. R. A. 40, it was held that the law of California, the lex rei sitae, fixed the status of the child for the purposes of inheritance; but the decision appears to be on the ground that the father was domiciled here and it seems assumed throughout that if he had been domiciled in England, the law of England would have governed. See I Wharton, Conflict of Laws (3d ed.), p. 555 n. This case rested also on the succession of illegitimates under Cal. Civ. Code, § 1387.

The rule that a child not legitimate according to English law cannot inherit land in England does not operate against the general rule, for the lex rei sitae requires not only that the child be legitimate, but that he must have been actually born in wedlock in order to so inherit. Birtwhistle v. Vardill (1839), 7 Cl. & F. 895, 7 Eng. Rep. R. 1308; Doe v. Vardill (1839), West, 500, 9 Eng. Rep. R. 578.

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father.[4] Conversely, where the act or event working a legitimation by the lex domicilii patris does not constitute a legitimation by the lex rei sitae, such children are generally considered legitimated for such inheritance.[5] This general rule is grounded on the principles that the lex domicilii should control the status or condition of a person and the relation in which he stands as to other persons[6] and that the legitimation of the child, being the creation of a status which is for most purposes beneficial to him, should be presumed in his favor whenever the lex domicilii patris will permit it.[7]

In order to apply this general rule that legitimation for succession as the child of the father should be determined by the lex domicilii patris, it is necessary in the present case to consider the nature of section 215 of the Civil Code. If it is a statute of descent, merely descriptive of a class of illegitimates who are thereby authorized to inherit the property, as is the nature of section 1387 of the Civil Code,[8] the fact that the father was domiciled outside the state will not deprive the children of any rights which the state may have given them in the estate of the intestate. But if it is to be construed purely as a statute creating a status of legitimacy between the illegitimate child and its father for all purposes, it would seem that the father should be domiciled in the state in order for it to operate for purposes beneficial to the child. The latter construction appears to be the proper one. The court in the principal case does not hesitate to read into the statute the wording of section 230, i. e. that it is a legitimation "for all purposes." In Blythe v. Ayres,[9] the court declared that section 215, conjoined with the principles of international law, would have changed the bastardy of the plaintiff in the world at large. Besides, the position of section 215 in the Code under the division "Persons," under the subdivision "Personal Relations," under the title "Parent and Child" indicates that this statute is to be considered merely as a statute fixing status.

F. H. M.

CORPORATION: STOCKHOLDERS' LIABILITY FOR TORTS.—Does section 322 of the Civil Code comprehend a stockholders' liability

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[4] Munro v. Saunders (1832), 6 Bligh N. S. 468, 5 Eng. Rep. R. 665; Eddie v. Eddie (1899), 8 N. D. 376, 79 N. W. 856, 73 Am. St. R. 765.

[5] Scott v. Key (1856), 11 La. Ann. 232; Miller v. Miller (1883), 91 N. Y. 315, 43 Am. R. 669; Bates v. Virolet (1898), 33 App. Div. 436, 53 N. Y. Supp. 893.

[6] Ross v. Ross (1880), 129 Mass. 243, 37 Am. R. 321; Shick v. Howe (1908), 137 Iowa, 249, 114 N. W. 916, 14 L. R. A. (N. S.) 980; Minor, Conflict of Laws (1901), § 68.

[7] 1 Wharton, Conflict of Laws (3d ed.), p. 556. See note in 65 L. R. A. 182.

[8] Estate of Magee (1883), 63 Cal. 414; In re Loyd's Estate (1915), 170 Cal. 85, 148 Pac. 522.

[9] Supra, n. 3.

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for the torts of a corporation? In *Lininger v. Botsford*[1] it was decided that this liability extends to the payment of damages for personal injuries occasioned by the negligence of the corporation.

The court declared that although the preponderance of authority may hold that liabilities ex delicto are not created by the imposition of a stockholders' liability for "debts" of the corporation, our statute[2] provides a liability for the "debts and liabilities contracted or incurred" by the corporation, which includes involuntary obligations imposed upon corporations for negligent or tortious acts. The court further declared that this statute was remedial in character, and should receive a liberal construction, one which will include within its scope as well a demand for damages for a tort as a claim for a debt arising upon contract.

It is as competent for the legislature to impose a liability on stockholders for the torts of corporations as it is for it to impose a liability for contracts.[3] The right to carry on business on a corporate basis is derived from the authority of the state and is subject to the terms prescribed by the incorporation laws of the state.[4] Whether a statute imposes a stockholders' liability for the torts of a corporation or not, is a question of legislative intent. In construing an early Massachusetts statute providing a stockholders' liability for corporate debts, Judge Story took the word "debt" in its broadest sense, as embracing any just demands, whether arising out of contract or tort.[5] Though it is clear that this term, especially when used in a constitutional provision, is not used in the technical sense so as to be limited to such demands as will sustain a common law action of debt,[6] yet it seems that the term may not be subject to the broad construction given it by Judge Story, unless the phraseology of the statute would warrant it.[7]

In order to ascertain the legislative intent, the object of the statute should be taken into consideration, i. e., whether the statute is remedial or penal in character.[8] A statute creating a general liability, not dependent on special circumstances, may

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[1] (Dec. 26, 1916), 24 Cal. App. Dec. 1.

[2] Cal. Const. Art. 12, § 3; Cal. Code, § 322.

[3] Rider v. Fritchey (1892), 49 Ohio Civ. 285, 30 N. E. 692, 15 L. R. A. 513. See note in 3 Am. St. R. 844.

[4] San Francisco v. Liverpool etc. Ins. Co. (1887), 74 Cal. 113, 15 Pac. 380, 5 Am. St. R. 425; 1 Clark and Marshall, Private Corporations (1901), § 37.

[5] Carver v. Braintree Mfg. Co. (1843), Fed. Cas. No. 2485, 2 Story, 432.

[6] Mill Dam Foundry v. Hovey (1839), 21 Pick. 417; Child v. Boston & F. Iron Works (1884), 137 Mass. 516, 50 Am. R. 328. See also 4 California Law Review, 331.

[7] Avery & Sons v. McClure (1909), 94 Miss. 172, 47 S. 901, 22 L. R. A. (N. S.) 256; 4 Thompson, Corporations (2d ed.), § 4842.

[8] Chase v. Curtis (1884), 113 U. S. 452, 28 L. Ed. 1038, 5 Sup. Ct. Rep. 554; Henley v. Meyers (1907), 76 Kan. 723, 93 Pac. 168, 17 L. R. A. (N. S.) 779.

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reasonably admit of a more liberal construction than a law which seems to recognize a principle of individual irresponsibility, subject to a very limited exception, and is intended to hold out such responsibility only as a penalty for the failure on the part of the corporate managers to perform certain acts directed in the law, and supposed to furnish some advantage to the public.[9] The conclusion to be drawn from the adjudicated cases is that where the term "debt"[10] is used, especially in penal statutes, it should be construed to apply only to claims arising out of contract; but where the terms "dues,"[11] "demand,"[12] "claims,"[13] "all acts,"[14] "liabilities"[15] and similar expressions are used, especially in remedial statutes, they should be construed to include all liabilities of the corporation, whether ex contractu or ex delicto. As the statute in the present case has for its object the imposition of a general stockholders' liability for all the debts and liabilities of the corporation, it would seem that it should be construed to include a liability for the torts of the corporation.

F. H. M.

CONSTITUTIONAL LAW: FARM LOAN ACT HELD VALID.—Within recent years the conviction has been growing that farmers, requiring money to carry on and extend their operations, are subjected to disadvantages which, not altogether necessary and not suffered by other classes, seriously hamper, if they do not imperil, the progress and welfare of agriculture. That this condition exists is shown by government investigations and reports and the rectification of this condition has engaged and is engaging the attention of Congress[1] and of several of the states.[2]

The case of *Hill v. Rae*,[3] in which a Farm Loan Act providing State credit facilities for farmers, was held valid, has therefore more than passing interest. The act was assailed as class legislation, denying equal protection of the law and contrary to the 14th amendment of the United States Constitution.

Under the police power a state may pass laws for the general

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[9] Cable v. McCune (1858), 26 Mo. 371, 72 Am. Dec. 214.

[10] Chase v. Curtis, supra, n. 8; Savage v. Shaw (1907), 195 Mass. 571, 81 N. E. 303, 122 Am. St. R. 272; Heacock v. Sherman (1835), 14 Wend. 58. See note in 22 L. R. A. (N. S.) 256.

[11] Rider v. Fritchey, supra, n. 3; Flenniken v. Marshall (1895), 43 S. C. 80, 20 S. E. 788.

[12] Heacock v. Sherman, supra, n. 10.

[13] 4 Thompson, Corporations (2d ed.), 1267.

[14] Kelly v. Min. Co. (1898), 21 Mont. 291, 53 Pac. 959, 42 L. R. A. 621.

[15] Buttner v. Adams (1916), 236 Fed. 105. See Miller & Lux v. Kern Co. Land Co. (1901), 134 Cal. 586, 66 Pac. 856.

[1] Federal Farm Loan Act of July 17, 1916.

[2] Report of California State Commission on Colonization and Rural Credits (Nov. 29, 1916); Senate Bill, No. 584.

[3] (Mont., 1916), 158 Pac. 826.

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comfort, health and prosperity of its people,[4] and when there are reasonable economic or political or social reasons for doing so, certain occupations or industries, or even classes of persons may be selected out for special regulation or for the enjoyment of special privileges.[5] Classification, however, must be based on some reasonable ground, some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.[6]

In Clark v. Kansas City[7] a statute was upheld which provided that cities could annex adjoining lands unless such lands were used for agricultural purposes. The court justified the principle distinguishing between agricultural lands and lands used for other purposes, saying: "That principle leaves to the state the adaptation of its laws to its conditions. The growth of cities is inevitable, and in providing for their expansion it may be the judgment of an agricultural state that they should find a limit in the lands actually used for agriculture." Likewise, in American Sugar Refining Co. v. Louisiana[8] where a state statute imposed a license tax on persons engaged in refining sugar, but exempted farmers grinding their own sugar the court sustained the law, saying: "The discrimination is obviously intended as an encouragement to agriculture, and does not deny to persons and corporations engaged in a general refining business the equal protection of the laws."

It is true that in Connolly v. Union Sewer Pipe Co.[9] a discrimination made by a state anti-trust law exempting from its operations agricultural products, was held a denial of the equal protection of the laws. However, as previously pointed out, classification must rest upon some difference bearing a reasonable and just relation to the act in respect to which the classification is proposed.[10] The idea underlying the decision is that if, in the large design to protect the public from extortion, combinations to control prices should be forbidden, all should be, because, with reference to that design, no legitimate distinction could be made among them. On this ground, the case is distinguishable.

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[4] Chicago, B. & Q. R. R. v. Drainage Commission (1906), 200 U. S. 561, 50 L. Ed. 596, 26 Sup. Ct. Rep. 341; Lawton v. Steele (1894), 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. Rep. 499; Commonwealth v. Alger (1851), 7 Cush. 53; Cooley, Constitutional Limitations, p. 831; Watson on the Constitution, p. 604; Willoughby on the Constitution, p. 1231.

[5] Missouri Pacific R. Co. v. Mackey (1888), 127 U. S. 205, 32 L. Ed. 107, 8 Sup. Ct. Rep. 1161. In re Lockwood (1894), 154 U. S. 116, 38 L. Ed. 929, 14 Sup. Ct. Rep. 1082; St. Louis v. Matthews (1897), 165 U. S. 1, 41 L. Ed. 611, 17 Sup. Ct. Rep. 243; Willoughby on the Constitution, p. 886.

[6] Gulf, C. & F. R. Co. v. Ellis (1897), 165 U. S. 150, 41 L. Ed. 666, 17 Sup. Ct. Rep. 255; Rippey v. Texas (1904), 193 U. S. 504, 48 L. Ed. 767, 24 Sup. Ct. Rep. 516.

[7] (1900), 176 U. S. 114, 44 L. Ed. 392, 20 Sup. Ct. Rep. 284; Cooley, Constitutional Limitations, p. 15.

[8] (1900), 179 U. S. 89, 45 L. Ed. 102, 21 Sup. Ct. Rep. 43.

[9] (1902), 184 U. S. 540, 46 L. Ed. 679, 22 Sup. Ct. Rep. 431.

[10] Supra, n. 6.

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Mr. Justice Holmes has pointed out that "We must be cautious about pressing the broad words of the Fourteenth Amendment to a drily logical extreme. Many laws which it would be vain to ask the court to overthrow could be shown, easily enough, to transgress a scholastic interpretation of one or another of the great guarantees in the Bill of Rights."[11] Similarly, Mr. Justice Field, in speaking of the Fourteenth Amendment, says: "Neither the amendment, broad and comprehensive as it is, nor any other amendment, was designed to interfere with the power of the state, sometimes called its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."[12]

T. G. C.

CONSTITUTIONAL LAW: PERSONAL SERVICE OF PROCESS.—The State of New Jersey has set a fashion in automobile legislation for which we may venture to predict a considerable vogue. She requires any non-resident automobilist entering New Jersey to constitute the secretary of state his attorney upon whom process may be served in any suit brought in consequence of damage done in the state, notice being then mailed to whatever address he has left for that purpose. Hitherto, the motorist has certainly been within the rule that in a personal action due process of law demands that the defendant either voluntarily appear or be personally served with process within the jurisdiction.[1] It is settled, however, that foreign corporations may be required to submit to a substituted service of process, upon the ground that their admission into a state is a matter of favor, to which the state may attach whatever conditions it likes.[2] Such justification is not present in the case of an individual or a partnership, for these are entitled to enter a state to transact business as a matter of right, so that similar statutes attempting to regulate them have been held unconstitutional in state and lower Federal courts,[3] as a denial of due process of law and of the privileges and immunities of citizenship in the

[11] Noble State Bank v. Haskell (1911), 219 U. S. 104, 55 L. Ed. 112, 31 Sup. Ct. Rep. 186, 32 L. R. A. (N. S.) 1062.

[12] Barbier v. Connolly (1885), 113 U. S. 27, 28 L. Ed. 923, 5 Sup. Ct. Rep. 357.

[1] Pennoyer v. Neff (1878), 95 U. S. 714, 24 L. Ed. 565; Hart v. Sansom (1884), 110 U. S. 151, 28 L. Ed. 101, 3 Sup. Ct. Rep. 586; Dull v. Blackman (1898), 169 U. S. 243, 42 L. Ed. 733, 18 Sup. Ct. Rep. 333.

[2] Cal. Civ. Code, § 405; Waters Pierce Oil Co. v. Texas (1900), 177 U. S. 28, 44 L. Ed. 657, 20 Sup. Ct. Rep. 518.

[3] Brooks v. Dunn (1892), 51 Fed. 138; Moredock v. Kirby (1902), 118 Fed. 180; Caldwell v. Armour (1899), 1 Pen. (Del.) 545, 43 Atl. 517; Flexner v. Farson (1915), 268 Ill. 435, 109 N. E. 327; Cabanne v. Graff (1902), 87 Minn. 510, 92 N. W. 461, 59 L. R. A. 735; note in 44 Am. Dec. 570; contra Guenther v. American Steel Hoop Co. (1903), 116 Ky. 580, 76 S. W. 419. See Cal. Civ. Code, § 2472.

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several states. There are intimations to the same effect in decisions of the United States Supreme Court.[4] But in Pennoyer v. Neff,[5] that court said that it did not "mean to assert that a State may not require a non-resident entering into a partnership within its limits, or making contracts enforceable there, to appoint an agent . . . in the state to receive service of process . . . and provide upon his failure to make such appointment . . . that service be made upon a public officer designated for that purpose."

Since the automobilist is likewise entitled to enter the state as a matter of right, the New Jersey statute would seem to call for some discussion of this apparently unsettled point; but in *Kane v. New Jersey*,[6] the Court, speaking through Mr. Justice Brandeis, was content to uphold the enactment upon the ground that "the speed of the automobile and the habits of men" rendered it reasonable in the interest of public safety, and that non-residents were not discriminated against but on the contrary were put on an equality with residents. If this, then, be a measure conferring equality upon the non-resident automobilist, a similar enactment respecting any non-resident entering the state for any purpose, or never entering it at all, must also be a measure promotive of equality. For so far as inequality goes all non-residents are clearly in the same situation. Or if we are to stress the imponderable contribution of such a measure to the public safety, a similar requirement from all transients would be undeniably productive of the same effect. It is axiomatic that danger emanates from the least suspected sources, and we may suppose that Pandora herself, to whom the responsibility for the existence of all of these perplexing problems may be directly traced, was a person of a sufficiently innocuous appearance. But what State would not wish to impose upon visits from her some such restraining influence as the New Jersey statute is credited with contemplating? In short, the considerations suggested by the court, if true, do not seem conclusive. Are the rather fragmentary remarks of the court to be taken as an endorsement and extension of what in Pennoyer v. Neff the court merely took pains not to deny?

C. A. R.

CRIMINAL LAW: SELF HELP: RETALIATION.—In *People v. Finali*[1] A hit B with a rock and ran inside a warehouse. B pur-

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[4] D'Arcy v. Ketchum (1850), 11 How. 165, 13 L. Ed. 648; Mason v. Eldred (1868), 6 Wall. 231, 18 L. Ed. 783; Hall v. Lanning (1875), 91 U. S. 160, 23 L. Ed. 271; Sugg. v. Thornton (1889), 132 U. S. 524, 33 L. Ed. 447, 10 Sup. Ct. Rep. 163.

[5] Note 2, supra.

[6] (Dec. 4, 1916), 242 U. S. 160, 37 Sup. Ct. Rep. 30. Cf. Kane v. State (1911), 81 N. J. L. 594, 80 Atl. 453, Ann. Cas. 1912-D, 237; and Cleary v. Johnston (1909), 79 N. J. L. 49, 74 Atl. 538.

[1] (Sept. 19, 1916), 23 C. A. D. 419, 160 Pac. 850.

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sued A, but being unable to force his way inside, fired through the door and killed A. While in no jurisdiction would B have been obliged to retreat from A's non-felonious assault, this right to stand his ground did not justify him in pursuing A for the purpose of killing him.

In the course of the opinion the court said, "Had the defendant overtaken the deceased in the heat of the moment and suitably punished him for this assault, he might not have been held blameworthy." Is there a right to pursue one who has committed an assault and to inflict reasonable chastisement? The earliest view of criminal punishment was for each person to avenge, in whatever manner he thought proper, a wrong done him by another.[2] Retaliation was the basis of the *lex talionis*, the "eye for an eye" of the Mosaic law.[3] Even in this, its crudest form, it may have found some recognition in the English law.[4] The Leges Henrici state that if A fell from a tree and killed B, B's relatives could climb a tree and fall on A,[5] and a modern parallel has been cited from the customs of Abyssinia.[6] In modern law the claim to the right to retaliate is usually denied.[7] One case, however, recognised such a right to a limited extent.[8] Retaliation, in the heat of the moment may, however, reduce a homicide from murder to manslaughter.[9] The modern retaliation is retaliation by the state as a theory of punishment, yet that theory of punishment is being discarded,[10] and if abandoned as a theory of punishment by the state, should it still have any recognition as a means of self help? The suggestion of the court harkens back to the days of duelling, when honor was thought to be dearer than human life, but that institution has almost died out; the current attitude toward it is expressed by a noted writer, who says,[11] "It is not an institution of honor, but a horrible and barbarous custom, which a

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[2] Cherry, The Growth of Criminal Law in Ancient Communities, p. 8.

[3] Leviticus, 24:20.

[4] Pollock and Maitland, History of English Law (2d ed.), p. 471; cf. p. 489.

[5] Leg. Hen. 88, § 9.

[6] Parkyns, Life in Abyssinia (1868), p. 366, cited in 2 Pollock and Maitland, History of English Law (2d ed.), p. 471.

[7] Regina v. Driscoll (1841), Car. & M. 212, 41 E. C. L. 120; State v. Burton (1900), 2 Pen. (Del.) 472, 47 Atl. 619; State v. Brooks (1912), 3 Boyce, 203, 84 Atl. 225; State v. Black (1915), 86 N. J. Law, 520, 93 Atl. 91.

[8] People v. Pearl (1889), 76 Mich. 207, 42 N. W. 1109, 4 L. R. A. 709, 15 Am. St. Rep. 304.

[9] Beasley v. State (1886), 64 Miss. 518, 8 So. 234; Franklin v. State (1892), 30 Tex. App. 628, 18 S. W. 468.

[10] Tarde, Penal Philosophy, 552, "If retaliation, as there can be no doubt, is a conception which has served its purpose, let us scorn it verbally, let us forget it in our laws and consequently either let us drive the scaffold from its last foothold, or let us cease to restrict the menace of it to murder and assassination."

[11] Rousseau, in Encyc. Britt. (11th ed.), Vol. 8, p. 541.

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courageous man despises and a good man abhors." The court's suggestion is not even supported by Von Jhering, an outspoken advocate of self help, whose most radical statement is,[12] "The defense of one's concrete legal rights, when those rights have been attacked, is a duty not only to himself but also to society." It is to be noticed that he says, "legal rights," but a person has no legal right to pursue and punish a person after all danger to himself is gone.[13] One of the ends of the law is to prevent private war. Dean Pound says,[14] "A condition in which self help and private war are the normal processes of society is the very antithesis of the legal order." The remark of the court that a person who has been assaulted may overtake the assailant in the heat of the moment and suitably chastise him, not only has little support either in authority or on principle, but would be a step backward in legal development.

S. F. H.

EVIDENCE: BOOKS OF ACCOUNT: LAYING FOUNDATION.—At a time when the social aspects of the law are being emphasized and developed, that which tends more closely to unite law and legal procedure with practical common sense is particularly welcome. This is especially true of the rules for laying the foundation for the introduction in evidence of account books.[1] While the business man has implicit faith in the correctness of his books and the commercial world as a whole relies upon them, they are not generally receivable in evidence until proved by a witness having personal knowledge of the facts recorded therein.[2] If the bookkeeper thus qualified is dead or absent from the jurisdiction the books would nevertheless be received, because of the necessity of the situation.[3]

In most cases, however, the entrant making up the books relies solely on the oral or written reports of others, having himself no personal knowledge of the transactions entered. These reports are hearsay.[4] Therefore, the original observers themselves must verify them,[5] unless possibly, such proof is excused by reason

[12] Von Jhering, "Struggle for Law" (Lalor's translation, 2d ed.), p. 76.
[13] Supra, n. 7.
[14] "Interest of Personality," 27 Harvard Law Review, 198.

[1] 10 R. C. L. 1174. See also, 1 California Law Review, 377.
[2] Wigmore, Evidence, § 1530.
[3] American Surety Co. v. Pauly (1896), 72 Fed. 470; Stanley v. Wilkerson (1897), 63 Ark. 556, 39 S. W. 1043; Meyer v. Brown (1902), 130 Mich. 449.
[4] Swan v. Thurman (1897), 112 Mich. 416, 70 N. W. 1023; San Francisco Teaming Co. v. Gray (1909), 11 Cal. App. 314, 104 Pac. 999; Chandler v. Robinett (1913), 21 Cal. App. 333, 130 Pac. 314.
[5] Kerns v. McKean (1888), 76 Cal. 87, 18 Pac. 122; People v. Mitchell (1892), 94 Cal. 550, 29 Pac. 1106; Butler v. Estrella Raisin Vineyard Co. (1899), 124 Cal. 239, 56 Pac. 1040; San Francisco Teaming Co. v. Gray, supra, n. 4; Chandler v. Robinett, supra, n. 4. See also, 52 L. R. A. 595, n.

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of death, absence from the jurisdiction, insanity or the like,[6] in which case the bookkeeper's verification of the entries as a correct copy of the original observer's statement is probably sufficient.[7] But more often the practical inconvenience of bringing in all the salesmen, clerks, teamsters and others having personal knowledge is as great an obstacle to the business man as absolute unavailability, and should operate equally as excusing their non-appearance. Some courts have adopted such a rule dispensing with the testimony "of witnesses having personal knowledge of the transactions when it appears that the testimony of such witnesses, because of death, interest, incompetence, absence, inconvenience, or otherwise is unavailing."[8]

In California the courts had not progressed so far. In the cases where the above rule might have been applied there was no showing of inconvenience or the like, so the results reached were proper[9] but the language used would seem to deny the rule in toto. The conclusion reached in *Montgomery and Mullen Lumber Company v. Ocean Park Scenic Railway Company*[10] by the District Court of Appeal is therefore all the more gratifying. In that case lumber salesmen, after filling an order in the yard, would come into the office and enter the transaction on the books in question in triplicate, of which the duplicate copy remained as a permanent record—the other two being sent out—and on which the office force made the extensions in dollars and cents. In proving the books, only the manager of the company was called. He testified that they were kept under his direction and that he knew to his own knowledge that they were correct charges. No salesmen were called or accounted for, but the books were admitted over the objection of defendant that no foundation had been laid.

The case is stronger on its facts than any yet considered, for the manager was neither an original observer nor an entrant. In People v. Mitchell[11] and San Francisco Teaming Co. v. Gray[12] the original observers were not called and the accounts would not be received on the testimony of the entrants alone. The principal case seems to change this rule and go even farther than the view contended for, that the original observer should be dispensed

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[6] That such is the general rule see cases cited supra, n. 3. In California there are no decisions, but there are dicta in accord. San Francisco Teaming Co. v. Gray, supra, n. 4.

[7] Wigmore, Evidence, § 1530.

[8] W. Va. Architects & Builders v. Stewart (1911), 68 W. Va. 506, 70 S. E. 113, 36 L. R. A. (N. S.) 899; Mo. Electric Light & P. Co. v. Carmody (1897), 72 Mo. App. 534; Chesapeake & O. Ry. Co. v. Stojanowski (1911), 191 Fed. 720.

[9] People v. Mitchell, supra, n. 5; San Francisco Teaming Co. v. Gray, supra, n. 4.

[10] (Nov. 11, 1916), 23 Cal. App. Dec. 716, 161 Pac. 1171.

[11] Supra, n. 5.

[12] Supra, n. 4.

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with on a showing of unavailability, by not even requiring that such a showing be first made. But it is eminently proper where there are a number of salesmen, teamsters and clerks making reports and several bookkeepers entering them, that the man who is in charge of all these activities and who knows that the books are regularly and correctly kept should be competent to so testify and enable the books to be received as evidence, particularly if a showing of inconvenience is made.

J. G.

MINING LAW: EXTRALATERAL RIGHTS ON VEIN POSSESSING CHARACTERISTICS OF ANTICLINAL FOLD OR ROLL.—An interesting question raised by the case of *Jim Butler-Tonopah Mining Company v. West End Consolidated Mining Company,*[1] is whether extralateral rights can be exercised in two opposite directions on a vein possessing the characteristics of an anticlinal fold or roll. That is, when the vein can be followed up on its dip to a crest or axis of the roll or fold and then turns over and dips down in an opposite direction, does this crest or axis of the roll constitute an apex? On this point there has been no positive adjudication. There are cases[2] holding that where there is a swell or wave or roll in a vein this does not constitute an apex. The vein in question was in the form of an anticlinal roll or fold. Heretofore, a terminal edge has been considered by the cases and authorities as an essential element of a legal apex.[3] One of the approved definitions says that a legal apex is "All that portion of a terminal edge of a vein from which the vein has extension downward in the direction of the dip."[4] The court in the Jim Butler-West End case decided that a terminal edge was not an essential element of a legal apex, saying that when the vein turns over and dips in an opposite direction, that the crest of the fold is the legal apex and that an extralateral right can be exercised in both directions on the opposite dipping limbs of the anticlinal vein. The decision is also noteworthy for the fact that this is the first time that the statute has been construed so as to award an extralateral right in two opposite directions. An examination of the mining laws of other countries where the extralateral right has been sanctioned in one form or another does not disclose any intimation that this right has ever been exercised on the same vein in two opposite directions.

[1] (July 3, 1916), 158 Pac. 876.

[2] Illinois Silver M. Co. v. Raff (1893), 7 N. M. 336, 34 Pac. 544; Iron Silver Mining Co. v. Murphy (1880), 3 Fed. 368, 375-76; Stevens v. Williams (1879), Fed. Cas. No. 13,414.

[3] Costigan on Mining Law, 139-40; Barringer & Adams, The Law of Mines and Mining, p. 442; Duggon v. Davey (1886), 4 N. Dak. 110, 26 N. W. 887; Alameda M. Co. v. Success M. Co. (Dec. 29, 1916), 161 Pac. 862.

[4] Lindley on Mines, p. 687; definition approved in Stewart M. Co. v. Ontario M. Co. (1914), 237 U. S. 350, 35 Sup. Ct. Rep. 610, 614, 59 L. Ed. 989.

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It is doubtful if the framers of the federal mining act had this situation in mind. It will be interesting to see whether the decision of the Supreme Court of Nevada will meet with the approval of the Supreme Court of the United States.[5]

S. F. H.

MORTGAGES: BAR OF THE STATUTE OF LIMITATIONS AS GROUND FOR QUIETING TITLE.—With the decision in *Bulson v. Moffatt*[1] it becomes evident that a mortgagor in California cannot under any circumstances quiet his title against an outstanding outlawed mortgage without first tendering the amount of the mortgage debt. In this case the mortgagor was denied relief though the mortgage was not only unenforceable because barred by the statute of limitations but also because it was invalid and illegal, having been so declared in a foreclosure proceeding which had terminated unsuccessfully more than twenty years prior to the bringing of this action.

The court based its decision in the main on the rule now firmly established in California that the statute of limitations gives only defensive rights, and cannot be relied upon for affirmative relief, except, perhaps, where it is invoked to prevent the exercise of a power of sale contained in an outlawed mortgage.[2] Thus the mortgagor even after the statutory time has elapsed cannot eject a mortgagee who has taken possession with his consent, or under color of law, while the mortgage was subsisting, without first tendering the amount of the mortgage debt.[3] Nor, as stated above, can he quiet title against an outstanding mortgage;[4] though it is to be noted that if in such action the mortgagee is so ill advised as to cross complain for a foreclosure he has by his own unsuc-

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[5] The case has gone to the U. S. Supreme Court on writ of error.

[1] (November 23, 1916), 52 Cal. Dec. 565, 161 Pac. 259.

[2] Goldwater v. Hibernia Sav. & Loan Soc. (1912), 19 Cal. App. 511, 127 Pac. 861. Contra, Mentzel v. Hinton (1903), 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 647, and note, 648. See also 6 L. R. A. (N S.) 510. Such power is not of course barred in a trust deed. Grant v. Burr (1880), 54 Cal. 298.

[3] Frink v. Le Roy (1874), 49 Cal. 314; Spect v. Spect (1891), 88 Cal. 437, 26 Pac. 202, 13 L. R. A. 137, 22 Am. St. Rep. 314; Hooper v. Young (1903), 140 Cal. 274, 74 Pac. 140, 98 Am. St. Rep. 56; Burns v. Hiatt (1906), 149 Cal. 617, 87 Pac. 196, 117 Am. St. Rep. 157. See Cameron v. Ah Quong (1908), 8 Cal. App. 310, 96 Pac. 1025. Similarly a pledgee cannot be deprived of his possession of the pledge without a payment of the debt even though the statute has run. Puckhaber v. Henry (1907), 152 Cal. 419, 93 Pac. 114, 125 Am. St. Rep. 75, overruling Mutual Life Ins. Co. v. Pacific Fruit Co. (1904), 142 Cal. 477, 76 Pac. 67.

[4] Booth v. Hoskins (1888), 75 Cal. 271, 17 Pac. 225; De Cazara v. Orena (1889), 80 Cal. 132, 22 Pac. 74; Hall v. Arnott (1889), 80 Cal. 348, 22 Pac. 200; Brandt v. Thompson (1891), 91 Cal. 458, 27 Pac. 763; Boyce v. Fisk (1895), 110 Cal. 107, 42 Pac. 473. See Raggio v. Palmtag (1909), 155 Cal. 797, 103 Pac. 312. See also, 6 L. R. A. (N. S.) 516; L. R. A. 1916 B 1220.

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cessful act "practically caused the removal of any cloud that might exist on plaintiff's title by reason of the existence of such mortgage."[5]

The free transfer of property is undeniably hindered by the existence of these apparently outlawed mortgages, even though a third person who purchases after the statute has run may quiet title without a tender.[6] This is because of the fact that the statute may have been tolled by the absence of the mortgagor from the jurisdiction, or the lien of the mortgage may have been extended by a mere renewal of the note prior to the purchase, in which case the purchaser will be subordinated to its lien.[7]

There is at present no way in which the mortgagor can establish by his own act that the mortgage is invalid or unenforceable. It might indeed have been argued that from the use of the word "extinguished" in section 2911 of the Code of Civil Procedure more must have been intended than that the statute should operate merely as a defense. Such a contention was favored in *Berkin v. Healey*,[8] a Montana case, which arose under an identical code provision, where it was stated that the mortgagor would have the right to cancel an outstanding outlawed mortgage. It might be desirable in order to make for free alienability of property to give him a right to quiet his title against such a mortgage when no payments have been made on it for a certain stated time, and no other acts have been done recognizing it as a valid mortgage,[9] or at least to provide some machinery whereby it could be definitely adjudicated that the mortgage had become barred.[10]

M. W.

PLEDGE: WAIVER BY EXECUTION AT INSTANCE OF PLEDGEE.—The authorities are divided as to whether a lienholder waives his lien by levying upon his security in a suit on the original debt. Much confusion has arisen from a failure to distinguish between a detention-lien, such as that of a common-carrier, in which continued possession is essential, and a pledge-lien, such as the

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[5] Marshutz v. Seltzor (1907), 5 Cal. App. 140, 89 Pac. 878.

[6] Faxon v. All Persons (1914), 166 Cal. 707, 137 Pac. 919; Muhs v. Hibernia Sav. & Loan Soc. (1914), 166 Cal. 760, 138 Pac. 352.

[7] Newhall v. Hatch (1901), 134 Cal. 269, 66 Pac. 266, 55 L. R. A. 673. But no renewal after he has purchased can affect him. Lord v. Morris (1861), 18 Cal. 482; Wood v. Goodfellow (1872), 43 Cal. 185; Foster v. Butler (1913), 164 Cal. 623, 130 Pac. 6.

[8] (June 3, 1916), 158 Pac. 1020.

[9] Such is the rule by statute in Massachusetts. Mitchell v. Bickford (1906), 192 Mass. 244, 78 N. E. 453; McMahan v. McMahan (1910), 205 Mass. 99, 91 N. E. 298.

[10] Such is the rule by statute in Kansas. "The act . . . . authorizes an adjudication as to the status of the mortgage when the action is begun, and the determination whether it is a live or dead security." Shepard v. Gibson (1912), 88 Kan. 305, 128 Pac. 371.

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pledge of collateral security, in which the creditor has an assignable interest.

The cases which consider that the holder of a detention-lien waives his right by levying on the subject of the lien[1] rely on two early decisions, Jacobs v. Latour[2] and Swett v. Brown. The latter has been declared by Judge Story to be a peculiarity of local Massachusetts jurisprudence,[3] and has been otherwise adversely criticized.[4] These cases proceed on the theory that the lienholder in order that the officer may make a levy must surrender possession to the sheriff, thereby losing the lien.

The opposing cases regard it as unjust to follow the technical strictness of the principle and hold that the sheriff is merely the agent of the lienholder.[5] The injustice of the technical view is apparent in situations in which the attachment or execution proves void. Here the creditor will obtain no remedy against his debtor if his lien be regarded as waived by the levy.

Technically, in order to levy, the lienholder must surrender possession to the sheriff. In the case of a detention-lien, this might be considered as a waiver,[6] but it cannot be so considered in the case of a pledge-lien. Here the pledgee has an assignable interest in the security, not a mere non-transferable right, dependent upon continued possession.[7]. In *Gault v. Wiens*,[8] however, the California Appellate Court, following an earlier California decision,[9] applied the strict detention-lien rule to a pledge case. The authorities cited[10] do not support the holding. Wingard

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[1] Jacobs v. Latour (1828), 5 Bing. 130, 130 Eng. Rep. R. 1010; Swett v. Brown (1827), 5 Pick. 178; Legg v. Willard (1835), 17 Pick. 140, 28 Am. Dec. 282; Citizens' Bank v. Dows (1886), 68 Iowa, 460, 27 N. W. 459; Lawrence v. McKenzie (1893), 88 Iowa, 432, 55 N. W. 505; (but see dicta in Stein v. McAuley (1910), 147 Iowa, 630, 125 N. W. 336 modifying former Iowa cases); Bank v. Neilsen (Wash., 1916), 159 Pac. 113; Potter v. Greenleaf (1899), 21 R. I. 483, 44 Atl. 718.

[2] Supra, n. 1.

[3] Story, Bailments, § 366.

[4] Arendale v. Morgan (1857), 5 Sneed, 703; Lambert v. Nicklass (1898), 45 W. Va. 527, 31 S. E. 951, 72 Am. St. Rep. 828, 44 L. R. A. 561. See also Consignees' Box Co. v. Speer (1908), 5 Ga. App. 156, 62 S. E. 1000.

[5] Lambert v. Nicklass, supra, n. 4; Wiggin v. Mankin (1909), 65 W. Va. 219, 63 S. E. 1091.

[6] Compare 12 Harvard Law Review, 571, with Miller v. Hyde (1894), 161 Mass. 472, 37 N. E. 760, where the court brushed aside similar technical arguments based on the selection of remedies (which proved in fact to be no remedies), and held that, in an action for conversion, title did not pass upon mere entry of judgment without satisfaction.

[7] Donald v. Suckling (1866), L. R. 1 Q. B. 585; Halliday v. Holgate (1868), L. R. 3 Ex. 299; Williams v. Ashe (1896), 111 Cal. 180, 43 Pac. 595; Brittan v. Bank (1899), 124 Cal. 282, 57 Pac. 84, 71 Am. St. Rep. 58.

[8] (Nov. 6, 1916), 23 Cal. App. Dec. 685, 161 Pac. 996.

[9] Latta v. Tutton (1898), 122 Cal. 279, 54 Pac. 844, 68 Am. St. Rep. 30.

[10] Wingard v. Banning (1870), 39 Cal. 543; Jacobs v. Latour, supra, n. 1; Jones, Pledges (2d ed.), § 599.

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v. Banning[11] is an attachment case under the Practice Act,[12] which did not allow attachments if a lien or pledge existed. The attachment in that case, after an affidavit that no security existed, was clearly inconsistent with the retention of the carrier's lien in question. Jacobs v. Latour[13] is also the case of a detention, not a pledge-lien. The authorities cited by Jones on Pledges as supporting a waiver by the creditor are in part detention-lien cases, which from their very nature cannot be taken as authority for pledge-lien cases, and, in part, cases of common-law mortgages. As to the latter, it is clearly inconsistent from a technical viewpoint for the mortgagee, as owner, to attach the property as belonging to the mortgagor. In the case of lien mortgages, the majority of cases hold that the mortgagee does not waive his lien by levying on the mortgaged property,[14] and for the purpose of securing justice, the same rule should apply to common-law mortgages. True, the title passes, but it passes only for the limited purpose of security, and, if the mortgagee can achieve the common intention of realizing upon his security by levying, he should be permitted to do so.

Dicta in certain Iowa cases, quoted by Jones, seem to agree with the California decisions, but these have been limited by a later decision of the Iowa court to cases of detention-liens.[15] The earlier Iowa cases have been adversely criticized[16] and have been followed but once,[17] and in this instance, the point was barely touched upon. There are several cases contra to the California holding.[18]

S. M. A.

PROPERTY: ALLUVION: RIGHT OF UPLAND OWNER TO ACCRETIONS FROM THE OCEAN.—In the case of *Strand Improvement Company v. City of Long Beach*[1] the Supreme Court seems to have settled in favor of the upland owner the California law upon the interesting question whether additions by accretion to land abutting on the ocean belong to the upland owner or to the state.

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[11] Supra, n. 10.

[12] Cf. Cal. Code Civ. Proc., §§ 537-8.

[13] Supra, n. 10.

[14] Case Co. v. Rice (1913), 152 Wis. 8, 139 N. W. 445; Stein v. Mc Auley, supra, n. 1; Madson v. Rutten (1907), 16 N. D. 281, 113 N. W. 872, 13 L. R. A. (N. S.) 554; Bank v. Mottin (1891), 47 Kan. 455, 28 Pac. 200. This question cannot arise in California unless § 726 of the Code of Civil Procedure be waived. See Martin v. Becker (1915), 169 Cal. 301, 305, 146 Pac. 665, 667 and 3 California Law Review, 427.

[15] Stein v. McAuley limiting Bank v. Dows and Lawrence v. McKenzie, supra, n. 1.

[16] Wiggin v. Mankin, supra, n. 5.

[17] Claflin v. Bretzfelder (1901), 69 Ark. 271, 62 S. W. 905.

[18] Jones v. Scott (1872), 10 Kan. 33; Arendale v. Morgan, supra, n. 4; Guenther v. Cary (1896), 17 Ky. L. Rep. 1262, 34 S. W. 232. See also Lincoln v. Linde (1891), 27 Abb. N. C. 278, 16 N. Y. Supp. 106.

[1] (Dec. 9, 1916), 52 Cal. Dec. 616, 161 Pac. 975.

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According to the civil law, the land which a river adds to a field by alluvion was acquired by the owner of the field.[2] But since no man could own the seashore below the highest point reached by the waves in the winter storms,[3] the property in land gradually added by the sea did not vest in the upland owner.[4]

The common law rule was otherwise, and land gained from the sea, by small and imperceptible degrees, either by alluvion, by the washing up of sand and earth so as in time to make terra firma, or by dereliction, as where the sea shrinks below the usual water marks, went to the owner of the land adjoining.[5]

In California the law has been confused by section 1014 of the Civil Code which provides that in the case of rivers and streams where land forms from natural causes by imperceptible degrees it belongs to the owner of the bank. This section, the United States Circuit Court of Appeals has regarded as covering the whole subject of accretion, and, applying the maxim, *"expressio unius"* and section 4 of the Civil Code declaring that "The rule of the common law that statutes in derogation thereof are to be strictly construed, has no application to this code," has decided that it abrogates the common law of alluvion as applied to the seashore.[6]

This reversion to the civil law rule is based upon a mistaken application of the rules of code construction. California by express enactment in 1850 adopted the common law, and it is a cardinal rule of interpretation that the common law continues, except as altered by the statute.[7] The common law of alluvion as to the seashore is not touched upon by section 1014, and should therefore continue.

The common law is clearly the wiser and more just rule. Many reasons have been assigned for its existence—Blackstone explains it on the ground that such gains are too trifling for the law to regard, and on the further ground that as the owners of the seashore are often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is a reciprocal compensation for such possible charge or loss.[8] Lord Hale rests his explanation on the basis of the maxim *"idem est non esse et non apparere,"* and this being the reason for the rule, it has been claimed that the right to alluvion ought only to be given when no definite bound-

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[2] Institutes, 2, 1:20; Gaius, 2:70.
[3] Institutes, 2, 1, 5; Institutes, 2, 1, 3.
[4] French Civil Code, § 538; Zeller v. Southern Yacht Club (1882), 34 La. Ann. 837.
[5] 2 Bl. Com. 262; Dana v. Jackson St. Wharf Co. (1866), 31 Cal. 118, 89 Am. Dec. 164; Wright v. Seymour (1886), 69 Cal. 122, 10 Pac. 323.
[6] Western Pac. Ry. Co. v. Southern Pac. Co. (1907), 151 Fed. 376.
[7] Sharon v. Sharon (1888), 75 Cal. 1, 13, 16 Pac. 345.
[8] 2 Bl. Com. 262.

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aries formerly existed.[9] It is, moreover, only fair and just that an owner should not be cut off from the shore to which he has formerly had approach. Whichever reason is the correct one, they all attest the value of the common law rule, and it is fortunate that the Supreme Court has seen fit in the principal case to maintain our law in accordance with it.

J. F. R.

RESTRAINTS ON ALIENATION: CHOSES IN ACTION.—Is a provision in a contract that one of the parties thereto shall not "assign any of the moneys payable under the contract or his claim thereto" without the consent of the other party, valid? Certainly this provision does not suspend "the absolute power of alienation" in violation of sections 715, 716, of the Civil Code,[1] for it allows the debt to be assigned with the debtor's consent, and the absolute power of alienation is not suspended when there are persons in being who can by their united efforts convey an absolute interest in possession.[2]

But is this provision a condition restraining alienation, which is repugnant to the interest created, and therefore void under section 711 of the Civil Code?[3] *Portuguese-American Bank of San Francisco v. Welles*[4] involved a construction contract between the City of San Francisco and a contractor which contained such a provision. In violation of this provision the contractor assigned a payment which had become due to him under the contract. The court held that, in the absence of complaint by the city, the assignment was valid as between the assignee and a creditor of the contractor.

That a provision against the assignment of a debt is a "condition restraining alienation" is clear; but is it "repugnant to the interest created?" It cannot be doubted that choses in action are within the general terms of section 711, for it is in that division of the Code which deals with property in general, and the Code recognizes the right of property in an obligation.[5] It may be urged, however, that section 711 is merely a re-enactment of the common law rules, that alienability is an essential attribute of certain interests in property, that to deprive such interests of the quality of alienability would be to create interests unknown to the common law, and that such interests cannot be created: that therefore the test of a condition's repugnancy to the interest created is the common law definition of such interest; and that

[9] Attorney-General v. Chambers (1895), 4 DeG. & J. 55, 45 Eng. Rep. R. 22; Hale, De Juris Maris, Chap. VI, II.

[1] Cal. Civ. Code, §§ 715, 716.

[2] Cal. Civ. Code, § 716; Toland v. Toland (1898), 123 Cal. 140, 55 Pac. 681; Blakeman v. Miller (1902), 136 Cal. 138, 68 Pac. 587.

[3] Cal. Civ. Code, § 711.

[4] (Nov. 13, 1916), 37 Sup. Ct. Rep. 3.

[5] Cal. Civ. Code, §§ 655, 1458.

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it necessarily follows from these premises that a condition restraining the alienation of a chose in action is not repugnant to the interest created, because assignability is not an essential attribute of a chose in action. Indeed, as a matter of legal history, assignability is a comparatively modern idea in connection with choses in action. But the operation of the rule enunciated in section 711 shows that whether a condition restraining alienation is repugnant to the interest created depends not so much upon common law definitions of the various interests in property as upon the dictates of public policy. For example, in general, if a man conveys his entire interest in property—whether it is is estate in fee simple or for life, a term of years, or an interest in personality—conditions imposed by him restraining its alienation are void;[6] but if he conveys a term for years restraining an interest in himself then a condition restraining alienation is good.[7] The difference between these two cases may well be explained upon the basis, that, in the former the grantor can present no reason, upon which the law looks with favor, to justify his making the interest inalienable; while in the latter case it is of unquestionable importance to the landlord that the tenant in possession be a person who will properly care for the property. Similarly, where it is necessary to protect property conveyed to a married woman from her husband, conditions restraining alienation are held valid, even though attached to the conveyance of the grantor's entire interest.[8]

But if we concede that section 711 establishes a rule of public policy against unnecessary restraints in alienation, then it should apply with equal force to all forms of property, whether tangible or intangible. And a distinction might properly be made between the assignment and the creation of a chose in action,—a distinction similar to that which exists between the assignment and a lease or sub-lease of a term for years,—with the result that the transferor of an obligation against a third party would not be able to impose a condition against its alienation, while one who creates a debt against himself, as in the principal case, would be considered as having such an interest as would justify his restraining its alienation.

R. E. H.

[6] De Peyster v. Michael (1852), 6 N. Y. 467; Potter v. Couch (1891), 141 U. S. 296, 35 L. Ed. 721, 11 Sup. Ct. Rep. 1005; Brandon v. Robinson (1811), 18 Ves. Jun. 429, 34 Eng. Rep. R. 379; Metcalfe v. Metcalfe (1889), 43 Ch. Div. 633; Co. Litt., § 223-a.

[7] Doe v. Watt (1828), 8 B. & C. 308, 108 Eng. Rep. R. 1057; Barry v. Stanton (1594), Cro. Eliz. 330, 78 Eng. Rep. R. 580; Doe v. Carter (1799), 8 T. R. 60, 300, 101 Eng. Rep. R. 1400; Weatherall v. Geering (1806), 12 Ves. Jur. 504, 33 Eng. Rep. R. 191.

[8] Baggett v. Meux (1844), 1 Coll. 138, 63 Eng. Rep. R. 355; In re Currey (1886), 32 Ch. Div. 361; Gray, Restraints on the Alienation of Property, § 125.

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WAYS OF NECESSITY: PARTITION.—While it is often said that there are two possible ways in which an easement may arise, by agreement of the parties, express or implied, and by act of law, in the last analysis all easements arise only in one way, from a grant, express or implied.

A way of necessity, arising from a division of land by an owner, is always founded upon an implied grant.[1] The question arises whether a way of necessity is implied from a division of land by a partition decree under which one of the parcels is entirely enclosed by others. This is answered in the affirmative in California,[2] and while there is some authority contra,[3] it would seem that the position of the California courts is right.[4] A grant of an easement may be implied from an act of law when the circumstances are such that the easement could be implied in an ordinary conveyance.[5] It has been suggested by the English courts[6] in construing an act of Parliament, "that the Act although proceeding from the legislature as paramount authority, and not directly from the proprietors of the soil, must be read as equivalent to a grant by the latter." The Supreme Court of California declared that there is no difference in effect between allotment by order of the court in a proceeding for partition and an allotment by deed from all the other tenants in common.[7]

It is clear that if the partition were voluntary there would arise the implied grant of a way of necessity. The partition decree should have the same result. "The effect of such partition is to convey the interest of the various co-tenants in the particular parcels to the allottees of those parcels. Each is, therefore, a grantor and a grantee, and the one to whom an enclosed piece is set off has the same rights against the other that he would have if they joined in a voluntary conveyance to him."[8] The way of necessity arises from the division of the land and it is immaterial whether the division takes place by agreement of the parties or by decree of the court.[9]

Granted that the holder of the enclosed parcel has this right,

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[1] Bullard v. Harrison (1815), 4 M. & S. 387, 105 Eng. Rep. R. 877; Carey v. Rae (1881), 58 Cal. 159.

[2] Blum v. Weston (1894), 102 Cal. 362, 36 Pac. 778, 41 Am. St. Rep. 188; Accord, Ellis v. Bassett (1891), 128 Ind. 118, 27 N. E. 344.

[3] Murphey v. Lincoln (1891), 63 Vt. 278, 22 Atl. 418; Gaynor v. Bauer (1903), 144 Ala. 448, 39 So. 749; Mayfair Property Co. v. Johnston, [1894] 1 Ch. 508.

[4] See 6 Columbia Law Review, 280.

[5] Supra, n. 2.

[6] The London & N. W. Ry. Co. v. Evans, [1893] 1 Ch. 16; Accord, Rangeley v. Midland Ry. Co. (1868), L. R. 3 Ch. App. 306.

[7] Supra, n. 2.

[8] Mesmer v. Uharriet (Dec. 22, 1916), 52 Cal. Dec. 722.

[9] Cal. Code Civ. Proc., § 764, as amended in 1907 would seem to be merely declaratory of the then existing law.

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is it not an equal and like right against each former co-tenant whose land prevents his access to a highway, and if so, who is to decide which particular parcel shall bear the burden? This question has apparently never been adjudicated. It was raised in *Mesmer v. Uharriet*,[10] and while not necessary to the decision of the case the court suggested a solution which seems reasonable and workable, viz: "Where the partition decree fails to provide roads, it may be that the location of ways of necessity should be fixed by a subsequent proceeding in which the owners of all the parcels which might be affected are brought in, and compensation may be provided to be paid to the owner of the parcel burdened with the easement by those who are relieved."

This would obviate the injustice which would result if the owner of one of the surrounding parcels should assume the burden of the easement to the advantage of the others, or if the holder of the enclosed parcel should be entitled to select a particular neighbor and place the burden upon his land.

F. H. W.

WILLS: INCORRECT AND INCOMPLETE DATE IN OLOGRAPHIC WILLS.—Probate of an olographic will was refused in *Estate of Vance*[1] because the testator inadvertently neglected to complete the year of the date so that it read " . . . . this 22nd day of March in the year of our Lord one thousand" instead of "one thousand nine hundred and ten." The will was held invalid because it did not contain a date within the meaning of section 1277 of the California Civil Code, defining an olographic will to be "one that is entirely written, dated and signed by the hand of the testator himself." By this decision, in accordance with a previous holding,[2] the California Supreme Court has followed the Louisiana Supreme Court[3] in establishing the distinction between an incorrect date, as where the year 1859 instead of 1889 is written,[4] which will not necessarily vitiate the olographic will, and an incomplete or deficient date, which will render the instrument invalid. The Louisiana court in making this distinction in the case of Heffner v. Heffner[5] referred to the fact that a similar distinction obtains among the French authorities in the inter-

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[10] Supra, n. 8.

[1] (Dec. 23, 1916), 53 Cal. Dec. 1.

[2] Estate of Carpenter (1916), 51 Cal. Dec. 335, 156 Pac. 464; cf. Estate of Price (1910), 14 Cal. App. 462, 112 Pac. 482.

[3] Heffner v. Heffner (1896), 48 La. Ann. 1088, 20 So. 281; Succession of Swanson (1912), 131 La. 53, 58 So. 1030; same case (1913), 132 La. 606, 61 So. 685.

[4] Estate of Fay (1904), 145 Cal. 82, 78 Pac. 340, 104 Am. St. Rep. 17.

[5] Supra, n. 3.

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pretation of article 970[6] of the Code Napoleon, of which section 1581 of the Louisiana Civil Code and section 1277 of the California Civil Code are almost literal translations.

The distinction, however, made by the French authorities between an incorrect and an incomplete date is not a distinction parallel to that pointed out by the Louisiana court and apparently established by the California cases. In France an olographic will is invalid if it does not contain the precise and certain indication of the day, month and year in which it was drawn,[7] for "when the legislature demanded a date, it did not mean to be contented with some date, but it desired the exact date."[8] It does not follow, however, that the day, month and year must be actually expressed in accordance with the ordinary calendar denominations, as has been frequently stated by the California and Louisiana courts,[9] but rather that the precise day, month and year must be fixed by enunciations or declarations in the instrument itself which are perfectly equivalent to the ordinary calendar designations and which fix with absolute accuracy the date of the testament.[10] Thus it is a sufficient date under the French law if the testator writes "Good Friday of the year 1756,"[11] or "Christmas 1898," or "the first of the year 1909" or "the day after the death of my wife."[12] In California, and probably in Louisiana and in France, common abbreviations of the date, such as "4-14-07"[13] or "Nov. 22, 97"[14] do not invalidate the will. On the other hand, in California and Louisiana at least,[15] a partly printed and partly written date is not sufficient because it is not "entirely written, dated and signed by the hand of the testator," but if in connection with the date a printed superfluity or surplusage appears, such as the place where the will was drawn, the instrument is not thereby vitiated.[16]

The incorrectness of the date, by the French authorities, is in

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[6] "Le testament olographe ne sera point valable, s'il n'est écrit en entier, daté at signé de la main du testateur: il n'est assujetti à aucune autre forme."

[7] Aubry & Rau, Cours de Droit Francais (4th ed.), vol. 7, p. 103; Baudry-Lacantinerie, Precis de Droit Francais (11th ed.), vol. 3, §§ 1013, 1014.

[8] Baudry-Lacantinerie, vol. 3, § 1014.

[9] Estate of Carpenter (1916), 51 Cal. Dec. 335, 156 Pac. 464; Estate of Price (1910), 14 Cal. App. 462, 112 Pac. 482; Estate of Martin (1881), 58 Cal. 530; Heffner v. Heffner (1896), 48 La. Ann. 1088, 20 So. 281; Fuentes v. Gaines (1873), 25 La. Ann. 85.

[10] Pothier (2d ed.), vol. 1, pp. 402, 403; Aubry & Rau, vol. 7, p. 103; Baudry-Lacantinerie, vol. 3, § 1013.

[11] Pothier, vol. 1, pp. 402, 403.

[12] Baudry-Lacantinerie, vol. 3, § 1013.

[13] Estate of Chevallier (1911), 159 Cal. 161, 113 Pac. 130.

[14] Estate of Lakemeyer (1901), 135 Cal. 28, 66 Pac. 961, 87 Am. St. Rep. 96.

[15] Succession of Robertson (1897), 49 La. Ann. 868, 62 Am. St. Rep. 672; Estate of Billings (1884), 64 Cal. 427, 1 Pac. 701.

[16] Succession of Robertson (1897) 49 La. Ann. 868, 62 Am. St. Rep. 672.

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general equivalent to the entire absence of the date.[17] On the one hand, however, after proof of the handwriting and in the absence of fraud, undue influence or suspicious circumstances, the date appearing in the will is presumably the correct one and its alleged incorrectness can be shown only by "intrinsic" evidence, that is, by the aid of the instrument itself, as where the inscribed date is anterior to that stamped in the water-mark of the paper upon which the instrument is written, or where the inscribed date is posterior to the testator's death.[18] On the other hand, the incorrectness of the date may in France be rectified if the precise and correct date can be accurately ascertained by the aid of the testament itself, providing the error was due simply to the inadvertence of the testator. If the act of falsely dating the will was an intentional one it cannot be rectified by any evidence.[19] And exactly the same considerations apply to an incomplete date or to one which is uncertain, as where the superimposition of a "9" over an "8" permits either the reading of "1887" or "1897."[20] The presumption that the inscribed date is the correct one is, of course, not applicable to an incomplete or an uncertain date, so that a date, incomplete or uncertain, will render an olographic will invalid unless it be completed or ascertained by intrinsic evidence, whereas an incorrect date, being presumably correct, aside from fraud, undue influence, or suspicious circumstances, will not invalidate the will unless its incorrectness can be demonstrated by the aid of the instrument itself and cannot be rectified by means of the same kind of evidence. And in all cases the incorrectness, incompleteness or uncertainty must be the result of simple inadvertence and not of intention.[21]

It is clear that the reasoning of the French authorities in these cases is fundamentally upon a different basis than the reasoning of the California and Louisiana courts. A comparison of the relative merits of the two lines of reasoning rests ultimately upon the question of public policy, rather than upon any logical grounds. It is submitted, however, that the California and Louisiana cases marking the distinction between an incorrect and an incomplete date might be reconciled with the French cases upon the ground that extrinsic evidence is not admissible, on the one hand, to prove the incorrectness of a complete date which is presumably correct, and, on the other hand, to supply the missing components of an incomplete date.

L. N. H.

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[17] Supra, n. 7.
[18] Aubry & Rau, vol. 7, pp. 103, 104, 109-113; Baudry-Lacantinerie, vol. 3, §§ 1014, 1020.
[19] Supra, n. 18.
[20] Supra, n. 18.
[21] Supra, n. 18.

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Book Reviews

A MANUAL OF THE FEDERAL TRADE COMMISSION. By Richard S. Harvey and Ernest W. Bradford. John Byrne & Company, 715 14th Street, N. W., Washington, D. C. 1916. pp. xxii, 457. $5.00.

The far-reaching significance of the Federal Trade Commission Act has scarcely been appreciated, even by the publicist and the economist. Beyond all doubt this legislation marks a fundamental change in governmental policy—a change as abrupt as that accomplished by the Act to Regulate Commerce in 1887. A single motive underlies both pieces of legislation. Each statute owes its enactment to the conviction that judicial remedies have not provided an adequate solvent for problems which arise in the particular field with embarrassing persistency. The principles of the law of carriers were sufficiently clear upon paper, but it was necessary to create a commission with novel powers before they became genuinely operative. Similarly, the Sherman Anti-Trust Act, enforceable solely in the courts, is, by general consent, largely ineffective, despite the vitality infused into it through the campaigns of the United States Department of Justice during the twelve years just past. Congress has again found it necessary to resort to regulation through a special administrative tribunal. And the influence of the Act to Regulate Commerce upon the text of the Federal Trade Commission Act is striking and significant.

The permanence of the Federal Trade Commission cannot be doubted, and not a few students of the situation are convinced that it is destined to assume in the field of trade a control no less potent than that held by the Interstate Commerce Commission over transportation. This may well be doubted, since the Interstate Commerce Commission has been invested with greater powers over common carriers than may constitutionally be asserted over non-public service operations. But there can be no question that a vast new field of legal-economic practice has been opened.

We are indebted to the authors and compilers of A Manual of The Federal Trade Commission for the first working tools of the new practice. Slightly more than one-half of this volume is devoted to a treatise on the law and a discussion of the functions of the Federal Trade Commission. These pages do not afford a profound dissertation upon the law, nor would the authors make any pretense to that effect. They have properly realized that an authoritative exposition of the law cannot be attempted in advance of decisions construing the statute and determining the powers of the Commission. The review is, however, intelligent and informative and cannot fail to be helpful.

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The appendix, which occupies the remaining half of the volume, is an especially convenient collection of materials comprising, inter alia, the Rules of Practice of the Federal Trade Commission, the text of the Federal Trade Commission Act, the Clayton Act, and related statutes, the report of the Senate committee leading to the passage of the statute, and memoranda of cases instituted by the United States under the anti-trust laws. The compilation is comprehensive and yet contains nothing which could be regarded as surplusage. The manual is certain to be of very practical assistance to the profession.

A. P. M.

THE EVOLUTION OF THE CIVIL LAW. By Charles Sumner Lobingier, Ph. D., LL. M. Published by the Author, 1915. pp. 105.

This little book consists of syllabi and material for thirty-three lectures on the history and system of the Roman Law. The volume is the outgrowth of the work of the author as professional lecturer on Civil Law in the University of the Philippines. The lecture material gives the more important matter for each lecture, with specific references to standard authorities. The book should prove a valuable and suggestive aid to any one giving a course on the Roman Law. On the basis presented, it is quite competent for a qualified person to develop a series of lectures. It might serve better for class use than one of the customary text-books.

The author has had large experience. Formerly Professor of Law in the University of Nebraska, Commissioner of the Nebraska Supreme Court, and Judge of the Court of First Instance in the Philippines, he is now Judge of the United States Court for China, and member of the Faculty of the Comparative Law School of China. He has done much writing on legal and sociological questions, his chief book being "The People's Law."

W. C. J.

TRUSTS, POOLS AND CORPORATIONS. Revised Edition. By Wm. Z. Ripley, Ph.D. Ginn & Company, 29 Beacon Street, Boston, Mass. 1916. pp. xxxiii, 872. $2.75.

Professor Ripley's first volume under this title was published in 1905, but the developments of the past ten years, particularly on the legal side, have compelled the preparation of a revised edition. The name of the editor suffices to attest the merit of the work.

This compilation is the result of an avowed attempt "to apply the case system, so successfully evolved in the Harvard Law School, to the study of economics." The trust problem lends itself readily to treatment by the case method. The subject is not too broad, and admits of a development extensive as well as intensive. Professor Ripley draws his material from all available sources, and, needless to remark, his selections are made advisedly. Scholarly

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studies of famous pools and combinations such as the Michigan Salt Association, the Whiskey Trust, the Wire-Nail Association, the Addystone Pipe Company and the Asphalt Combination, by such authorities as Jenks, Edgerton and Tatnall, reports of the United States Bureau of Corporations covering several of the larger industrial combinations, and other papers of a similar nature, occupy the preliminary chapters and constitute what may be regarded as the essentially economic division. The chapters immediately following are devoted to the judicial construction of the Sherman Anti-Trust Act. Opinions in representative cases from the Knight Case (to-day graciously forgiven and overruled) to the International Harvester and National Cash Register Cases are reproduced substantially in full. Professor Ripley's clear perspective is evidenced by his organization of these decisions. The chapters in which they are incorporated are entitled, (XVI) Early Supreme Court Decisions, 1890-1901; (XVII) Definitive Anti-Trust Law Interpretation, 1901-1911; (XVIII) The Rule of Reason Applied Concretely, 1911-1915. The appropriateness of the classification will be apparent to all who have had occasion to pursue the development of the law. The text of the Federal Trade Commission Act and the Clayton Law follows logically, and the concluding pages of the work are devoted, for purposes of comparative analysis, to monopolies and combinations in Europe.

Professor Ripley is peculiarly qualified to prepare a work of this character. While the compilation is designed primarily for the political economy class room, the lawyer cannot fail to derive interest and profit from its pages.

A. P. M.

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Books Received

A TREATISE ON FEDERAL IMPEACHMENTS. By Alex Simpson, Jr. The Law Association of Philadelphia, Philadelphia, Pa. 1916. pp. 230.

BENDER'S FEDERAL REVENUE LAW. By the Publisher's Editorial Staff. Matthew, Bender & Co., Albany, N. Y. 1917. pp. 438. $4.00.

A TREATISE ON THE LAW OF TELEGRAPH AND TELEPHONE COMPANIES. By S. Walter Jones. 2nd Ed. Vernon Law Book Co., Kansas City, Mo. 1916. pp. xxxi, 1065. $7.50.

A TREATISE ON AMERICAN AND ENGLISH WORKMEN'S COMPENSATION LAWS. By Arthur B. Honnold. Vernon Law Book Co., Kansas City, Mo. 1917. 2 vols. pp. x, 1905. $15.00.

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California Law Review

VOL. V MAY, 1917 Number 4

Federal Incorporation of Railroads

ONE of the most important public utility problems now before the American people is the proposal of the railroads that Congress enact legislation compelling each railroad to any extent engaged in interstate commerce to secure, in lieu of its present state charter, a charter from the Federal Government.

As nearly every railroad in the United States is to some extent engaged in interstate commerce, this proposal would result in the transmutation of practically every railroad corporation in this country from a state corporation to a federal corporation.

The proposal for federal incorporation of the railroads presents some very interesting questions.

Is the withdrawal from the states of practically all their powers over railroads—the avowed purpose of the federal incorporation plan—desirable?

What will be the effect of federal incorporation of the railroads on the powers new exercised by the states with respect to purely state commerce?

Will the federal incorporation of the railroads enable the railroads to remove themselves from state jurisdiction over purely state commerce, without amending the commerce clause of the Constitution?

Is the particular plan of federal incorporation advocated by the railroads in the public interest?

What would be the effect on railroad rates and on the compensation hereafter to be paid by the Federal Government for the railroad properties, if Congress should now enact legislation in effect compelling all railroads to take out national char-

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ters under a plan which perpetuates all outstanding railroad securities including all the water therein?

These and many other interesting questions are involved in the plan of federal railroad incorporation which is being urged by the railroads before the Newlands Joint Committee of the Senate and of the House of Representatives.

It is not my purpose in this paper to discuss the merits of the proposal of the railroads to take from the states practically all their powers even over purely state railroad business. This is a subject of very great importance which merits consideration in a paper devoted to that subject alone. It is my purpose to consider in this paper, as succinctly as possible, the other questions just suggested.

The Newlands Plan.

For several years, Senator Newlands of Nevada has been urging the enactment by Congress of legislation providing for the federal incorporation of railroads. Such incorporation, however, is to be only part of a comprehensive plan for the regulation of the relationship between the railroads and both federal and state governments, the railroads and their patrons, the railroads and their security holders, and the railroads and their employees.

The plan of Senator Newlands provides that any railroad corporation may secure a federal charter, but only with the consent of the parent state; that the states shall retain their power to regulate the rates of purely state commerce and their power to enact police regulations with reference to such commerce; that the physical properties of the railroads shall continue to be taxable by the state wherein such properties are located; and that the new federal railroad corporation shall issue, in exchange for the property of the state railroad corporation, securities not exceeding the fair value of the property to be transferred, as such value may be determined by the Interstate Commerce Commission.

The Newlands plan also provides for the establishment of an accident and insurance fund for the benefit of employees; for action by the Interstate Commerce Commission as a board of conciliation between the railroads and their employees; for the limitation of dividends to seven per cent on the outstanding

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capital stock; and for the application of net earnings in excess of such dividends to betterments, extra dividends, or future inadequacy of earnings, as directed by the Interstate Commerce Commission.

The Railroad Plan.

The plan of federal railroad incorporation now being urged by the railroads before the Newlands Joint Committee, omits, in my opinion, most of the commendable features of the Newlands plan and apparently has in view solely the withdrawal of the railroads from the jurisdiction of the states and the perpetuation, by direct compulsion of the Federal Government, of all their outstanding securities, whether issued for value or not.

While the railroads have not as yet presented the details of their plan, its broad outlines clearly appear in the testimony thus far presented by them to the Newlands Joint Committee.

The railroads urge the enactment by Congress of legislation providing, in effect, that after a day certain no railroad in the United States shall be permitted to continue to engage in interstate commerce, unless it has secured from the Federal Government a charter under a statute to be enacted by Congress; that such incorporation is to be compulsory, as distinguished from elective; and that the consent of the state from which the railroad holds its charter shall not be necessary.

The states are to be deprived of all their powers over railroads with reference to rates, service, safety, equipment and facilities, the issue of securities and every other matter affecting purely state commerce as well as interstate commerce, except that, as a matter of policy, the states are to be permitted "for the present" to retain their power to tax railroad property located within their borders and to exercise police powers over railroads in matters which are "not vital."

The new federal railroad corporation is to acquire the property of the existing state corporation subject to all outstanding bonds and other indebtedness and is to issue its capital stock in an amount equivalent to the entire outstanding capital stock of the state corporation. In a word, all the outstanding securities of the existing state railroad corporation, entirely without regard to their relationship to the fair value of the property or to the existing relationship between bond capital and share

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capital, are to be perpetuated in the form of the existing indebtedness and new capital stock is to be issued by the federal railroad corporation in an amount equivalent to the entire outstanding capital stock of the state railroad corporation without any regard whatsoever to its fair value, this to be done under compulsion of the Federal Government.

Each existing state railroad corporation is to be converted into a federal railroad corporation, so that, except to the extent to which mergers or consolidations may later be authorized, there will be just as many federal railroad corporations as there are now state railroad corporations.

EARLY FEDERAL RAILROAD CORPORATIONS.

In four cases, ranging between 1862 and 1871, the Federal Government heretofore incorporated federal railroad corporations. In each of these instances, the railroad was incorporated by special act of Congress for the purpose of connecting the Middle West by rail with our Pacific Coast possessions and in each instance the Federal Government, by means of land grants and other considerations, gave generous assistance to the new railroad.

The first federal railroad was the Union Pacific Railroad Company, which was incorporated by Act of Congress of July 1, 1862, for the purpose of constructing a railroad from the 100th meridian east of Greenwich, west, to connect with Central Pacific Railway Company, a California corporation.[1]

The second federal railroad was the Northern Pacific Railroad Company, which was incorporated by Act of Congress of July 2, 1864, for the purpose of constructing a line of railroad from Lake Superior to Puget Sound, in the State of Washington, with a branch line to Portland, Oregon.[2]

The third federal railroad was the Atlantic and Pacific Railroad Company, which was incorporated by Act of Congress of July 27, 1866, for the purpose of constructing a line of railroad from Springfield, Missouri, to Albuquerque, New Mexico, and thence to the Colorado River and to the Pacific Ocean. In the same act, the Southern Pacific Railroad Company, a Cali-

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[1] 12 Stats. at L. 489.
[2] 13 Stats. at L. 365.

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fornia corporation, was authorized to connect with the Atlantic and Pacific Railroad Company at the California state line.[3]

The fourth federal railroad incorporated during the period hereinbefore referred to was the Texas and Pacific Railroad Company, which was incorporated by Act of Congress on March 3, 1871, for the purpose of constructing a line of railroad from Marshall, Texas, to San Diego, California.[4]

Legal Problems.

The proposed federal incorporation of the railroads presents a number of very interesting legal problems.

That the Federal Government has the power, whenever deemed necessary in the exercise of a governmental function, to create a corporation has been unquestioned ever since the decision of the Supreme Court of the United States in the leading case of McCulloch v. Maryland.[5] The same doctrine was announced in Osborn v. United States Bank.[6]

The power of the Federal Government to create a railroad corporation to act as its agent or instrumentality in the performance of a function of the Federal Government is equally clear.[7] The power of the Federal Congress to create a corporation for the purpose of constructing a bridge across navigable water between two states has likewise been upheld.[8]

Many more legal problems in part as yet unsolved are involved in the plan of the railroads. Among the most important of these problems are the means to be used to transfer to the new federal corporation the title to the property of the existing state corporation, with due regard to the rights of the stockholders of the state corporation, and the effect of federal railroad incorporation on the power of the states to regulate purely state commerce. I shall consider herein only the latter question. The effect of the proposed federal incorporation of the railroads on the powers of the states will be considered with reference to

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[3] 14 Stats. at L. 292.
[4] 16 Stats. at L. 573.
[5] (1819), 4 Wheat. 316, 4 L. Ed. 579.
[6] (1824), 9 Wheat. 738, 6 L. Ed. 204.
[7] California v. Central Pacific Rd. Co. (1887), 127 U. S. 1, 32 L. Ed. 150, 8 Sup. Ct. Rep. 1073.
[8] Luxton v. North River Bridge Co. (1894), 153 U. S. 525, 38 L. Ed. 808, 14 Sup. Ct. Rep. 891.

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various classes of state powers in the following order: rates, taxes, securities, service, safety and police regulations.

Rate Power of States.

The railroads frankly declare that it is their purpose to take from the states their entire power over railroad rates, specifically including their power over purely state rates. The railroads advocate the federal incorporation of the railroads principally for the purpose of accomplishing this end and contend that the federal incorporation of the railroads is a means adequate to accomplish their purpose.

The reports of the Supreme Court of the United States are full of decisions holding that under the commerce clause of the Constitution, the power of the Federal Government to regulate commerce is limited to commerce "with foreign nations, and among the several states, and with the Indian tribes," and that the states have the right to regulate purely state commerce as long as such regulation is not confiscatory and does not discriminate against commerce subject to the jurisdiction of the Federal Government.

The claim now urged by railroad lawyers that by reason of its control over the instrumentalities of interstate commerce the Federal Government has complete control over each railroad to any extent engaged in interstate commerce, even as to rates for purely state transportation, finds greater comfort in the hopes of these lawyers than in the decisions of the Supreme Court of the United States. It is unquestionably the prevailing opinion among well informed constitutional lawyers that the railroads cannot prevail in their campaign to take from the states their power over purely state commerce unless they shall first have persuaded the people of the United States to amend the commerce clause of the Constitution so as to take from the states the powers which apparently have been reserved to them.

However, a number of decisions of the Supreme Court of the United States, dealing specifically with railroads incorporated by the Federal Government, lend strong support, on an entirely different theory, to the plan of the railroads. These cases strongly intimate that if the Federal Government, in incorporating a federal railroad corporation, declares that such railroad shall be used for military purposes and shall be a post road and

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clearly expresses the intention that such railroad shall not be subject to regulation by any state, such railroad will be subject to the exclusive control of the Federal Government in all matters, including purely state transportation. This conclusion is reached, apparently not under the commerce clause, but under the military power of the Federal Government and under its power "to establish post offices and post roads."

In Reagan v. Mercantile Trust Company,[9] decided on May 26, 1894, the Mercantile Trust Company brought an action against the Railroad Commission of Texas and the Texas and Pacific Railway Company, to restrain the enforcement, as against the Texas and Pacific Railway Company, of the Railroad Commission Act of the State of Texas. The Mercantile Trust Company was trustee under an issue of bonds of Texas and Pacific Railway Company. The Mercantile Trust Company and the Texas and Pacific Railway Company both earnestly contended that Texas and Pacific Railway Company, being a federal corporation, was not subject to the control of the State of Texas, even as to rates for transportation wholly within the state. Mr. Justice Brewer, in presenting the opinion of the Supreme Court of the United States, held that this contention was unsound for the reason that there was nothing in the language of the act incorporating the Texas and Pacific Railway Company to justify the claim that the Federal Government had shown an intention that this railroad should be removed from the jurisdiction of the State of Texas in purely state affairs. Mr. Justice Brewer says:[10]

> "Similarly we think it may be said that, *conceding to Congress the power to remove the corporation in all its operations from the control of the State,* there is in the act creating this company nothing which indicates an *intent* on the part of Congress to so remove it, and there is nothing in the enforcement by the State of reasonable rates for transportation wholly within the State which will disable the corporation from discharging all the duties and exercising all the powers conferred by Congress. By the act of incorporation Congress authorized the company to build its road through the State of Texas. It knew that, when constructed, a part of its business would be the carrying of

[9] (1894), 154 U. S. 413, 38 L. Ed. 1028, 14 Sup. Ct. Rep. 1060.
[10] Reagan v. Mercantile Trust Co., supra, n. 9, at p. 416.

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> persons and property from points within the state to other points also within the State, and that in doing so it would be engaged in *a business, control of which is nowhere by the Federal Constitution given to Congress.*" (Italics mine).

Continuing, Mr. Justice Brewer says:

> "It must have known that, in the nature of things, the control of that business would be exercised by the State, and *if it deemed that the interests of the nation and the discharge of the duties required on behalf of the nation from this corporation demanded exemption in all things from state control, it would unquestionably have expressed such intention in language whose meaning would be clear.* Its silence in this respect is satisfactory assurance that, in so far as this corporation should engage in business wholly within the State, it intended that it should be subjected to the ordinary control exercised by the State over such business." (Italics mine).

It will be observed that Mr. Justice Brewer was willing to concede, for the purpose of this decision, that Congress has the power to remove a federal railroad corporation in *all* its operations from the control of the state, but that he based his decision on the fact that the charter of the Texas and Pacific Railway Company did not show an *intention* on the part of the Federal Government to thus exempt the Texas and Pacific Railway Company from state control in state affairs. This position of the Supreme Court is all the more significant in view of the fact that the briefs of counsel for the Mercantile Trust Company and the Texas and Pacific Railway Company specifically drew the attention of the Supreme Court to the fact that the incorporation of the Texas and Pacific Railway Company could be sustained not merely under the commerce clause, which clause has always been construed to contain a limitation reserving to the states the power to regulate purely state commerce, but also under two additional powers of the Federal Government, the one power being the military power and the other the power to etsablish post roads. Under the language of the Federal Constitution, neither of these two powers is subject to any limitation with reference to state lines.

In Smyth v. Ames,[11] decided on March 7, 1898, certain stockholders of Union Pacific Railway Company brought an

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[11] (1898), 169 U. S. 466, 42 L. Ed. 819, 18 Sup. Ct. Rep. 418.

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action against the railway and certain public officials of the State of Nebraska to enjoin the enforcement as against the Union Pacific Railway Company of an act of the Legislature of Nebraska regulating railroads and fixing maximum freight rates. It was urged by the stockholders of the railway company that Union Pacific Railway Company was a federal corporation and that under its charter the Federal Government had reserved to itself the exclusive control of rates, both interstate and purely state. Mr. Justice Harlan, in delivering the opinion of the Supreme Court of the United States, held that the language of the federal charter could not reasonably be construed so as to reserve to the Federal Government these exclusive powers. Mr. Justice Harlan refers with approval to the language hereinbefore quoted from Reagan v. Mercantile Trust Company and concludes (at page 522) as follows:

> "Until Congress, in the exercise either of the power specifically reserved by the eighteenth section of the act of 1862 or its power under the general reservation made of authority to add to, alter, amend or repeal that act, prescribes rates to be charged by the railroad company, it remains with the States through which the road passes to fix rates for transportation beginning and ending within their respective limits."

This language contains a clear intimation that the Federal Government has the power, in incorporating a federal railroad corporation, to reserve to itself complete authority over such corporation, even as to purely state commerce. The intention to reserve such power, however, must be clearly expressed in the act of incorporation.

In the Minnesota Rate Case,[12] decided on June 9, 1913, Mr. Justice Hughes refers as follows to the contention of the Texas and Pacific Railway Company in the Reagan case:

> "It was insisted that this company was 'not subject to the control of the State, even as to rates for transportation wholly within the State,' the argument being that it was not within the state power to limit the Federal franchise to collect tolls. But the court held that the act of Congress did not go to the extent asserted but left the company, as to its intrastate business, subject to state authority."

Three times the Supreme Court of the United States, speak-

[12] (1913), 230 U. S. 352, 425, 57 L. Ed. 1511, 33 Sup. Ct. Rep. 729.

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ing successively through Justices Brewer, Harlan and Hughes, has thus clearly intimated that if the Federal Government in incorporating a federal railroad clearly expresses the intention that such railroad shall not be subject to state control, the states will have no power over the railroad, even as to purely state commerce. It may be urged that in none of these three cases was the point necessary to the decision and that it would be a more sound doctrine to limit the exclusive control of the Federal Government under the military power and under the power to establish post roads, to matters of a military and postal nature and to hold that with reference to other classes of commerce the limitations of the commerce clause must govern. But it may be suggested that this qualification was not made in the decision in any of the three cases hereinbefore cited.

In view of these three decisions, I consider it to be entirely unsafe to support the proposition of federal incorporation of the railroads on the assumption that the power of the states over purely state commerce cannot be taken from the states, even under federal incorporation, without an amendment of the commerce clause of the Federal Constitution. If the plan of federal incorporation of the railroads should be successful, the railroad lawyers will undoubtedly argue before the Supreme Court of the United States, in confident reliance on the three decisions hereinbefore cited and on language showing the intention of the Federal Government, to be inserted in the statute, that the railroads have been entirely removed from control by the states, even as to all purely state matters, with the sole exception of the taxing power and police powers in matters "not vital," it being the intention, at present, to so word the general statute as to reserve these two powers to the states.

Taxing Power of States.

As already indicated, the railroads are willing, as a matter of policy, to leave to the states, "for the present," their power to tax railroad property.

That the railroads could thereafter, by simply amending the federal incorporation statute, take this power, also, from the states, would seem to be clear from the decisions of the Supreme Court of the United States.

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In Thompson v. Pacific Railroad,[13] it was urged that the Union Pacific Railway Company's property in Kansas was exempt from the payment of taxes levied by the state of Kansas, not under any specific language in the act of Congress incorporating this railroad, but "from the relations of the road to the general government."

The Supreme Court of the United States, speaking through Chief Justice Chase, distinguishes between the instrumentalities employed by the government and the property of the agents employed by the government, and holds that as long as Congress has not interposed to protect from state taxation the physical property of a federal railroad corporation, such property may continue to be taxed by the state. However, the Chief Justice holds that Congress may "exempt, in its discretion, the agencies employed in such services [referring to federal railroad corporations] from any state taxation which will really prevent or impede the performance of them." And (at page 590) the Chief Justice further holds that "in the absence of express legislation to that effect" federal railroad corporations continue, with reference to their physical property, to be subject to state taxation.

In Railroad Company v. Peniston,[14] the Supreme Court of the United States held, by a divided court, that the public authorities of the State of Nebraska might levy taxes on the physical property of Union Pacific Railroad Company, a federal railroad corporation, but not on its operations in the state. Justices Strong, Clifford, Miller and Davis held that the state tax under consideration was valid because it was merely a tax on the tangible property of the railroad and not on its operations. Mr. Justice Swayne concurred solely on the ground that Congress had not granted to the Union Pacific Railroad Company exemption from state taxation, but added that this railroad corporation "is a national instrumentality of such character that Congress may interpose and protect it from state taxation whenever that body shall deem it proper to do so." Justices Bradley and Field, dissenting, held that under its federal charter the Union Pacific Railroad Company is exempt from all state taxation. Mr. Justice Hunt also dissented. It seems entirely clear that if the

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[13] (1869), 9 Wall. 579, 19 L. Ed. 792.
[14] (1873), 18 Wall. 5, 21 L. Ed. 787.

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Federal Act incorporating the Union Pacific Railroad Company had expressly exempted this railroad from state taxation, the State of Nebraska would have been deprived of the right to tax even the tangible property of Union Pacific Railroad Company located within its borders.

In Central Pacific Railroad Company v. California,[15] the Supreme Court of the United States said:

> "It may be regarded as firmly settled that although corporations may be agents of the United States, their property is not the property of the United States, but the property of the agents, and that a State may tax the property of he agents, subject to the limitations pointed out in Railroad Company v. Peniston."

The Supreme Court then continued as follows:

> "Of course, if Congress should think it necessary for the protection of the United States to declare such property exempted, that would present a different question."

From these authorities, the conclusion may fairly be deduced that if the Federal Government, in providing for the incorporation of a federal railroad, should clearly express the intention that such railroad shall not be subject to state taxation, no state would thereafter have the power to tax such federal railroad corporation, not even its tangible property located within the borders of the state.

Power of States Over Securities.

That the Federal Government, under a plan of federal incorporation of the railroads, could provide, by appropriate language, for *exclusive* control over the issue by such railroads of capital stock, bonds and other evidences of indebtedness, seems entirely clear.

The Supreme Court of the United States has frequently held that whenever the Federal Government enacts legislation providing for regulation in a particular field of interstate commerce, the states may not thereafter lawfully exert any authority in that particular field of interstate commerce.[16]

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[15] (1896), 162 U. S. 91, 125, 40 L. Ed. 903, 16 Sup. Ct. Rep. 766.

[16] Northern Pacific Ry. Co. v. State of Washington (1912), 222 U. S. 370, 56 L. Ed. 237, 32 Sup. Ct. Rep. 160; Southern Ry. Co. v. Railroad Commission of Indiana (1915), 236 U. S. 439, 59 L. Ed. 661, 35 Sup. Ct. Rep. 309.

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The matter would seem to be too apparent to necessitate further discussion.

Power of States Over Service.

At the present time the various states exercise important powers with reference to the service, equipment and facilities of railroads. These powers include matters such as the quality and adequacy of the service; the adequacy of equipment, both passenger and freight; the construction, heating, lighting and sanitation of depot and station buildings; the number and stopping of trains; the construction of spur tracks; and the construction of physical connections between railroad tracks.

Under the decisions hereinbefore referred to, the Federal Government, under a plan of federal incorporation of railroads could provide that these powers, even as to purely state commerce, could be completely withdrawn from the states.

Power of States Over Safety.

The states likewise exercise important powers over the safety of railroad construction and operation, from the point of view both of the railroad employees and of the traveling public. These powers include such matters as the investigation and prevention of railroad accidents; the establishment of proper operating rules; the maintenance of proper clearances, both vertical and horizontal; the installation of block or other signals and of interlocking devices; the condition and manning of equipment; and the safety of the construction and operation of railroad crossings.

Under the decisions hereinbefore referred to, the use of appropriate language in the Federal Incorporation Act would presumably withdraw from the states the exercise of all these powers over all railroads to any extent engaged in interstate commerce.

Police Powers of States.

The states at the present time exercise important police powers, applicable to railroads, with reference to health, safety and morals. Although some constitutional lawyers have expressed the opinion that the Federal Government cannot interfere with the exercise by the states of their so-called "police powers," this view is in conflict with the decisions of the Supreme Court of the United States. The law of the land, as expressed by these decisions, un-

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doubtedly is that as to interstate commerce the Federal Government has the power to enact regulations which shall supersede the police powers of the states.[17]

A familiar case of the exercise of state police powers over railroads is to be found in the laws of many of the southern states providing for separate coaches for whites and blacks. Under the decisions hereinbefore cited, the Federal Incorporation Act, either as originally adopted or thereafter amended, could undoubtedly provide that with reference to this matter as well as all other police matters the state should thereafter exercise no power whatsoever, in so far as any railroad to any extent engaged in interstate commerce is concerned.

Effect of Railroad Plan.

With reference to the effect of the railroad plan on the powers now exercised by the states, it may be said that if the doctrine announced in the Reagan case and subsequent cases should be applied by the Supreme Court of the United States, the Federal Government, by the use of appropriate language in the Federal Incorporation Act, could deprive the states of *all* powers of any character whatsoever over any railroad to any extent engaged in interstate commerce.

The plan as actually proposed by the railroads is to deprive the states, "at present," of *all* such powers, with the exception only of the power to tax and the power to enact "non-vital" police regulations.

The effect of the railroad plan on the financial structures of the railroads themselves is a matter which requires the most serious consideration. The railroad plan provides, in effect, that the new federal railroad corporation shall take over the property of the existing state railroad corporation, subject to the entire outstanding indebtedness, and that the new federal railroad corporation shall issue its capital stock to an amount equal to the entire outstanding capital stock of the state railroad corporation. Whatever water exists in the railroad stock now outstanding is to be perpetuated, through the act of the Federal Government, in the

[17] Hipolite Egg Co. v. U. S. (1911), 220 U. S. 45, 55 L. Ed. 364, 31 Sup. Ct. Rep. 364; Hoke v. U. S. (1913), 227 U. S. 308, 57 L. Ed. 523, 33 Sup. Ct. Rep. 281; Sligh v. Kirkwood, (1915), 237 U. S. 52, 59 L. Ed. 835, 35 Sup. Ct. Rep. 501; Seven Cases of Eckman's Alterative v. U. S. (1916), 239 U. S. 510, 60 L. Ed. 411, 36 Sup. Ct. Rep. 190.

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new capital stock which is to be issued by the new federal corporations.

As hereinbefore pointed out, the Newlands plan provided that the property of the existing state railroad corporations should be transferred to the new federal railroad corporations on the basis of the issue by the new federal corporations of securities not in excess of the *fair value* of the property which is to be transferred. This would seem to be not merely a fair proposition, but also a very necessary step in order to establish sound railroad financial structures in lieu of many which are now unsound. However, when Mr. Alfred P. Thom, who appears in behalf of the railroads before the Newlands Joint Committee, was asked by Senator Cummins whether the railroads would be willing to limit the issue of securities by the new federal corporations to the fair value of the property, Mr. Thom flatly refused to entertain such a proposition, stating that the issue of securities equivalent only to the fair value of the railroad properties "would result in the financial ruin of the world." (Transcript, p. 399).

Mr. Thom suggested, in reply to the argument that it would be most inadvisable to have the Federal Government compel the issue by the new federal corporations of large amounts of stock in excess of the fair value of the property, that the new stock might be issued without par value and that in this way the difficulty might be overcome. However, as Senator Cummins pointed out, such a solution of the problem would "simply delude the country." One of the chief causes of the financial difficulties in which many of the railroads now find themselves is that their outstanding securities are largely in excess of the fair value of their property. Additional funds for capital expenditures cannot be secured by these railroads from the sale of bonds for the reason that the amount of bonds already outstanding is equivalent to, or greater than, the fair value of the property, nor can such funds be secured from the sale of capital stock for the reason that there is little or no equity at present behind the existing capital stock and no possibility, under just and reasonable rates, of earning substantial dividends to be paid on new capital stock in addition to capital stock which was issued by the railroads for little or no consideration. The issue of capital stock without par value in lieu of the capital stock now outstanding would not add a single dollar to the value of the property or increase by

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a single dollar the amount of net earnings available for dividends on capital stock, or in any way improve the present financial structure of the railroads. Unless the investors of our country are "deluded," as suggested by Senator Cummins, they will be very slow, as long as the financial structures of these railroads remain as they are, to purchase additional securities, either bonds or capital stock. These comments, of course, do not apply to railroads whose financial structures are sound.

Furthermore, the plan suggested by the railroads may involve most serious consequences with reference both to future railroad rates and to the price which the Federal Government will ultimately pay for the property of the railroads. As already pointed out, the new capital stock is to be issued, in effect, under compulsion of the Federal Government. Will not the railroads hereafter urge, under these circumstances, that the government is estopped from claiming that the property of the railroads is worth less than the amount of the securities the issue of which was thus compelled? Is this not one of the real reasons for the plan of federal incorporation proposed by the railroads? Is it not their desire to lay the foundation for hereafter urging increases in rates on the basis of the securities to be issued under compulsion of the Federal Government? And, furthermore, are they not attempting to lay the foundation for hereafter claiming a high value, based on the issue of such securities, when the people of the United States finally purchase this property? In either event, this aspect of the railroad plan is worthy of the most careful consideration from the American people.

In my opinion, entirely apart from other features of the plan, the railroad proposal should never be adopted except on the basis of the limitation of the issue of the new securities to the fair value of the property and on the basis of a proper relationship between the various classes of securities.

Federal Incorporation Unnecessary.

The representatives of the railroads before the Newlands Committee repeatedly admitted that they can accomplish by direct legislation, such as by the amendment of the Interstate Commerce Act, everything which they hope to accomplish by the indirect instrumentality of federal incorporation. This admission is subject to the qualification that it may be possible, under a Federal

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Incorporation Act passed in the exercise of the military power and the power to establish post roads, to take from the states powers which could not be taken from them under the commerce clause of the Constitution as it now reads.

Referring specifically to the control of the issue of railroad securities, Mr. Thom has repeatedly admitted that exclusive federal control of such issues can just as effectively be established, as a matter of law, by the passage of the Rayburn Bill or some other amendment to the Interstate Commerce Act, as by providing a plan of federal incorporation of the railroads.

Then why do the railroads advocate the enactment of the indirect means of federal incorporation when they can just as readily accomplish their purpose by dealing directly and openly by amending the Interstate Commerce Act? Is it because they think that they can more readily accomplish their purpose by indirect means which are not clearly seen and understood than by direct action in the open? The only answer given by the railroads is that before bankers would purchase railroad securities issued under federal control thereof, established by amendment to the Interstate Commerce Act, they would insist on having the legality of such amendment established by a decision of the Supreme Court of the United States. The railroads contend, on the other hand, that if federal incorporation were effected, these same bankers would purchase railroad securities thereafter issued, without questioning the legality of the machinery provided by the Federal Government.

These arguments of the railroads are, in my opinion, by no means persuasive. It would be a comparatively simple matter to take to the Supreme Court of the United States a test case raising the question as to whether the Federal Congress may, by direct amendment of the Interstate Commerce Act, provide for exclusive or any other regulation of the issue of railroad securities. Statutes involving important changes in matters affecting property interests as well as human rights, are constantly passed by the Federal Congress and in due course the Supreme Court of the United States passes thereon, adjudicating all questions of doubt. The most signal weakness in this position of the railroads is their assumption that no litigation would follow the adoption by the Federal Government of the railroad plan of compulsory incorporation of all the railroads. If this plan is adopted, I predict

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that there will follow thereon the greatest flood of railroad litigation which the United States has ever known.

The only reason urged by the railroads in favor of accomplishing their purpose indirectly instead of directly is the desire of these bankers to have the indirect method adopted rather than the direct method. This reason, in my opinion, is entirely unsatisfactory from the public point of view.

General Conclusions.

Finally, I desire to suggest a few general conclusions on the subject of federal incorporation of the railroads.

1. It cannot be said, as a general proposition, that federal incorporation of the railroads is necessarily inherently good or bad. For instance, a plan of federal incorporation of the railroads under which the amount of outstanding securities would be reduced to a reasonable amount, the financial structures of the railroads improved and their ability to secure the necessary additional funds enhanced, without at the same time taking away from the states their powers over essentially local matters would be regarded as a good plan by many public-spirited citizens who regard the present railroad plan as essentially bad. Hence it is necessary in passing judgment on a plan of federal incorporation of the railroads, to consider the details of the particular plan presented and then to determine whether that plan, with its details, is or is not desirable.

2. The plan of federal incorporation now presented by the railroads is, in my opinion, distinctly against the public interest. It is calculated to break down the entire machinery of public regulation without in any degree improving the unsound financial structures from which many of the railroads are suffering. Furthermore, it has inherent in it grave dangers to future rates and to the future price to be paid by the Federal Government for the properties of the railroads, as hereinbefore pointed out.

3. The entire purpose of the railroad plan would seem to be to escape regulation by the states and to perpetuate the existing railroad securities. Unless these purposes are commendable, the plan certainly should not be adopted.

4. When the framework of a Federal Incorporation Act has once been provided, even though necessary qualifications and limitations are at first contained therein, it will be a simple mat-

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ter for a subsequent Congress to strike out the qualifications and limitations so that the railroad purpose will be completely accomplished.

5. No convincing reason has been shown why such legislation as may now be desirable should not be enacted directly by amendment of the Interstate Commerce Act or other direct legislation instead of by the indirect, devious method proposed by the railroads.

Max Thelen.

San Francisco, California.

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Is the Regulation of Railroad Crossings a Municipal Affair?

IN THE case of City of Los Angeles v. Central Trust Co.,[1] the Supreme Court of California recently held that the City of Los Angeles, by charter provisions, had the power to open streets across a railroad, and to regulate the manner in which the crossing should be maintained, guarded and protected by the railroad company and by the municipal authorities. They held that this was, under the constitution,[2] a municipal affair, and consequently paramount to general laws which would have operated except for the charter provisions.[3] The controversy involved the question whether Section 43 of the Public Utilities Act of 1911[4] controlled in the matter of railroad crossings in the City of Los Angeles. This section provides that no crossings of any railroad by a street, or of any street by a railroad, shall be made without permission of the Railroad Commission, and that the Commission shall have exclusive power to prescribe the manner, place and grade of crossings.

It seems to us that the Supreme Court was mistaken in the position it took and that the question is of so great importance, and so likely to arise again, that we venture to suggest the grounds of our view that the interpretation of the Court is erroneous. Inasmuch as the case under discussion may be upheld on other grounds, it is to be hoped that the court will, on proper occasion, set forth clearly and unmistakably its view whether the determination of the place and manner of railroad crossings is a municipal affair or a state affair.

The Public Utilities Act was not passed until December 23, 1911, taking effect on March 23, 1912. There had been passed, however, on February 9, 1911, the Railroad Commission Act,

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[1] (Sept. 11, 1916), 52 Cal. Dec. 298, 159 Pac. 1169.

[2] Cal. Const. Art. XI, § 6.

[3] Law v. San Francisco (1904), 144 Cal. 384, 391, 77 Pac. 1014; Fritz v. San Francisco (1901), 132 Cal. 373, 377, 64 Pac. 566; Byrne v. Drain (1900), 127 Cal. 663, 667, 60 Pac. 433; Barber etc. Co. v. Costa (1915), 171 Cal. 138, 152 Pac. 296.

[4] Cal. Stats. Spec. Sess. 1911, pp. 18, 40.

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which, by Section 15,[5] gave the Commission the same power over railroad crossings as section 43 of the Public Utilities Act of December 23, 1911. The Railroad Commission Act was explicity ratified and confirmed by section 22 of article XII of the constitution as amended on October 10, 1911. Section 23 of article XII of the constitution as amended on October 10, 1911, contained a proviso saying that "this section shall not affect such powers of control over any public utility vested in any city and county or incorporated city or town," unless the municipality should vote to release its control to the Railroad Commission. Section 82 of the Public Utilities Act of December 23, 1911, followed the same wording, substituting "this act" for "this section."[6] As section 23 of article XII was amended in November, 1914, the proviso reads: "this section shall not affect such powers of control over public utilities as relate to the making and enforcement of local, police, sanitary, and other regulations, other than the fixing of rates, vested in any city and county or incorporated city or town," unless surrendered by the municipality. The charter of the City of Los Angeles, as amended on March 25, 1911, gave to the city the following powers: "To establish, lay out, open . . . . or otherwise improve streets, lanes, alleys, boulevards, crossings, courts, and other highways and public places;" and also, "To regulate, subject to the provisions of the constitution of the State of California, the construction and operation of railroads, interurban railroads, street railways, or other means of transportation, conduits, waterworks, and works or plants for the production, transmission or distribution of gas, electricity, heat, refrigeration or power, and the works or plants of any other public service utility."[7]

It is our opinion (1) that the regulation of railroads, that is to say, general, commercial railroads, is a state affair and not a municipal affair; (2) that whatever jurisdiction in the matter of railroads may belong to municipalities, jurisdiction over the conditions of railroad crossings at least had at the time of the institution of proceedings in the present case, been taken away by proper legislation and vested in the Railroad Commission;

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[5] Cal. Stats. 1911, pp. 13, 18.
[6] Cal. Stats. 1911, pp. 18, 62.
[7] Cal. Stats. 1911, pp. 2061, 2063.

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and (3) that, even failing the validity of these contentions, nevertheless sections 22 and 23 of article XII of the constitution as amended in 1911, gave the Railroad Commission complete and exclusive control over the conditions under which railroad crossings may be constructed.

(1) To open, lay out, and improve streets within the city, is unquestionably a municipal affair,[8] as here held by the court. And there is no doubt that Los Angeles had by its charter of 1889 effectively claimed this power.[9] But it is essentially a different question whether the determination of the place and manner in which a street shall cross a commercial railroad track is or can be under our constitution other than a state affair under the control of the legislature. We believe that the authority which a city has over railroads arises from the provisions of section 11 of article XI of the constitution rather than from the provisions of section 6 of article XI. Section 6, before November 3, 1914, provided that city charters, except in municipal affairs, should be subject to and controlled by general laws. Section 11 reads: "Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws." The principle is, that if the power comes from section 6 it is then a municipal affair and the charter provision is paramount to general laws on the same subject. But a power which is exercised under section 11 is subject to displacement by the enactment of a general law on the same subject, no matter what the charter may say. We will not go so far as to say that no police or sanitary regulations may not be municipal functions and beyond control by the legislature; but we believe that the purpose of this section is to allow municipalities authority to regulate their local police and sanitary situation in matters which only incidentally affect police questions of general state concern and only so long as the state legislature refrains from acting thereon.

The charter provision of Los Angeles mainly relied on to give the city power to regulate the place and manner of street

[8] Sinton v. Ashbury (1871), 41 Cal. 525, 531; People v. Holladay (1892), 93 Cal. 241, 248, 29 Pac. 54, 27 Am. St. Rep. 186; Hellman v. Shoulters (1896), 114 Cal. 136, 149, 44 Pac. 915, 45 Pac. 1057; Byrne v. Drain, supra, n. 3.

[9] Cal. Stats, 1889, p. 457.

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and railroad crossings is in these words: "To regulate, subject to the provisions of the constitution of the State of California, the construction and operation of railroads . . . . and the works or plants of any other public utility.[10] We cannot convince ourselves that all of the powers enumerated in this provision are strictly municipal functions. In particular, we do not believe that the "regulation of the construction and operation of railroads" is a municipal function. On the contrary, we believe it is essentially a state affair and under the control of the legislature. We believe tthat this must necessarily be so, apart from any constitutional provision on the subject, and that the court, if looking squarely at the question, would so declare. Such a view does not oust the city of all jurisdiction, but such jurisdiction as it has is probably only concurrent in its nature, and subject to be superseded by general laws. The local police power which a municipality may exercise over railroads is derived from section 11 of article XI, namely, "to make and enforce all such local, police, and sanitary regulations as are not in conflict with general laws." The situation is much like that between a state in the exercise of its police power and the general government in the exercise, say, of its power over interstate commerce. The state, in the absence of congressional legislation, may do many things which incidentally affect interstate railroads, such as regulate the speed of trains and stopping places, but its regulations must yield whenever they conflict with the powers belonging to Congress.[11] Here the city may exercise its regulatory control over railroads subject to any general laws. Therefore, we believe that the amendment to the Los Angeles charter in 1911 giving the city power to "regulate, subject to the provisions of the Constitution of the State of California, the construction and operation of railroads," was a power or mere local police regulation, already authorized by section 11 of article XI, and defeasible by general legislation. Section 17 of article XII of the constitution has always declared that "all railroad, canal and other transportation companies are common carriers, and subject to legislative control." And the Supreme Court has said: "It is universally recognized that the state in its sovereign capacity has the original

[10] Cal. Stats. 1911, p. 2063.

[11] Adams Express Co. v. Kentucky (1909), 214 U. S. 218, 53 L. Ed. 972, 29 Sup Ct. Rep. 633.

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right to control all public streets and highways, and that except in so far as that control is relinquished to municipalities by the state, either by provision of the state constitution, or by legislative act not inconsistent with the constitution, it remains with the state legislature to be exercised in any manner not prohibited by the state constitution."[12]

If the state has a supreme right over streets and highways in general, how much more obvious is its jurisdiction over railroads, whose franchises are derived from legislative authority,[13] and which operate through several counties and perhaps through the whole length of the state. Just because the proposition is so obvious, is why we are perhaps lacking in direct judicial authority thereon.

(2) In the second place, it seems to us, from an examination of the law, that whatever jurisdiction the city might otherwise have exercised over the place and manner of railroad crossings had, at the time of the institution of proceedings in the present case, been superseded by appropriate general laws. Under section 6 of article XI of the constitution as it has existed since November 3, 1914, it would not be necessary for a new city charter or a properly amended charter to make claim of any specific power as a municipal affair; all affairs that are municipal belong to it as of course. But between November 3, 1896, and November 3, 1914, it was necessary for a city to enumerate the municipal functions which it wished to exercise in order to be exempt from general laws.[14] And, of course, both before November 3, 1914, and since then, a function, even though claimed in the charter as municipal, would not be held within the competence of the city, if in fact it be a state affair and not a municipal one.

The court says that the charter of Los Angeles as amended in 1911 contained a clause giving to the city power "to regulate, subject to the provisions of the Constitution of the State of California, the construction and operation of railroads, and other public utilities in their operations within the city. (Sec. 2, subd. 30.)" And then the court says further: "The charter of 1889 and

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[12] Western Union Tel. Co. v. Hopkins (1911), 160 Cal. 106, 118, 116 Pac. 557.

[13] San Francisco & San Mateo Elec. Ry. Co. v. Scott (1904), 142 Cal. 222, 75 Pac. 575.

[14] Fragley v. Phelan (1899), 126 Cal. 383, 58 Pac. 923.

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the amendments of 1905 and 1909 to section 2 gave to the city similar powers. (Stats. 1889, 457; Stats. 1905, 994; Stats. 1909, 1291.)"

We submit that the court is mistaken in saying that the charter of 1889 and the amendments of 1905 and 1909 had similar provisions to that of 1911. We believe that the amendment of 1911 giving the city power of regulation over the construction and operation of railroads was new. The charter of 1889 had no provision mentioning railroads. Subdivisions 7 and 8 of section 2 read as follows:

> "7. To provide for supplying the city and its inhabitants with water or gas, or either, or other means of heat and illumination.
>
> "8. To lay out, open, extend, widen, improve, or vacate, pave, and repave streets and alleys, sidewalks and crossings, and other highways."[15]

In 1905 subdivision 7 of section 2 was amended to read as follows:

> "(7) To provide for supplying the city and its inhabitants with water and gas, or either, or with other means of heat, illumination or power; and to acquire or construct and to lease or operate, and to regulate the construction or operation of conduits or of railroads or other means of transit or transportation, and of plants and equipments for the production or transmission of gas, electricity, heat, refrigeration or power, in any of their forms, by pipes, wires or other means; and to incur a bonded indebtedness for any of such purposes, provided the question of the issue of bonds therefor shall first be submitted to the qualified electors of the city at a special or general election, and that three-fifths of the votes cast on the question of said issue of bonds shall have been cast in favor thereof."[16]

In 1909, subdivision 7 was amended by inserting the word "electricity" after the first mention of water and gas, and by changing the vote necessary for issuing bonds from three-fifths to two-thirds of the votes cast. Another subdivision mentioning railroads, numbered "(7b)" was added, as follows:

> "(7b). To acquire or build and operate railroads and interurban railroads from any point within the city limits, to any place or places within Los Angeles county and located

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[15] Cal. Stats. 1889, p. 457.
[16] Cal. Stats. 1905, p. 994.

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on the ocean, or any inlet thereof, for the purpose of transporting passengers or freight between the city and the ocean, and to fix and collect charges therefor."[17]

Superficially read, the amendment of 1905 would seem to give a general power to regulate railroads, but further consideration seems to lead to the obvious conclusion that the amendments of 1905 and 1909 were intended to invest the city with authority to construct and maintain municipally owned railroads and other utilities. It is furthermore manifest that the purpose in subdivision 7 was to authorize intramural railroads only, for subdivision 7b was added in 1909 in order to authorize interurban and tide-water railroads. Los Angeles, along with some other cities in the state, was leading the way towards municipally owned and operated utilities. And this tendency found expression in the constitution as amended in 1911, by declaring that "any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication.[18] The constitution here indicates the kind of public utilities which it is proper for municipalities to control, and, hence, control over which is properly a municipal affair. For what the city is here authorized to do for itself, it might under proper charter provision empower private enterprise to do. But while "transportation" is here authorized, it is transportation within the city by means of street railways and not transportation into and out of the city, whether by railroad or otherwise. Further, in interpreting subdivision 7, given above, as amended in 1905, it is well to remember these words of our Supreme Court: "It is thoroughly settled that language purporting to define the powers of a municipal corporation is to be strictly construed, and that any 'fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied.' (1 Dillon on Municipal Corporations, § 89.)"[19]

Now, proceedings in the case under discussion, to condemn property of the railroad company in order to open a street across their right of way, were begun December 26, 1911. Action in the superior court was begun April 18, 1912.

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[17] Cal. Stats. 1909, p. 1291.
[18] Cal. Const. Art. XI, § 19.
[19] Oro Electric Corp. v. Railroad Commission (1915), 169 Cal. 466, 477, 147 Pac. 118.

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On February 10, 1911, the Railroad Commission Act was passed, conferring upon the Railroad Commission exclusive power over railroad crossings, whether of one railroad by another railroad, or of a railroad by a public road or highway; such power including the point of crossing, and separating, changing or abolishing crossings.[20] Section 22 of article XII of the constitution, as amended October 10, 1911, declared that the provisions of the Railroad Commission Act of February 10, 1911, should be construed with reference to that section and any other constitutional provision becoming concurrently operative therewith. The act of February 10, 1911, was thus given constitutional sanction, and the provision above referred to was later made more explicit by section 43b of the Public Utilities Act of December 23, 1911, which defined what was meant by railroad crossings, saying that the Railroad Commission should have exclusive authority over "each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public road or highway by a railroad or street railroad and of a street by a railroad or vice versa."[21]

Thus, by operation of the general law of February 10, 1911, which was in effect made part of the constitution by vote of the people on October 10, 1911, control over crossings between streets and railroads had been vested in the Railroad Commission. Now, of course, if the matter of railroad crossings within city limits is wholly a municipal affair, the state legislature could not permanently bar chartered cities from exercising their rightful functions; but the presumption is at least just as strong that the legislature in enacting section 15 of the Act of February, 1911, was within its rights, when it explicitely charged the Railroad Commission with exclusive control over railroad crossings, as that the people of Los Angeles were within their rights, when they claimed control over railroads as a municipal function, if indeed that was their intention, which we doubt. The general law of February, 1911, and the Los Angeles charter provisions of October, 1911, must either be in accord or in conflict. We are unable to see any conflict. There is no reason to suppose that the power distinctly vested in the Railroad Commission by the Act of

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[20] Cal. Stats. 1911, p. 18.
[21] Cal. Stats. Extra Session 1911, p. 40.

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February was withdrawn therefrom, as to Los Angeles, by the charter amendment of March. And the wording of the charter amendment is in further support of the view that no conflict was thereby caused. Every consideration leads to the conclusion that the charter amendment "to regulate, subject to the provisions of the Constitution of the State of California, the construction and operation of railroads," was but a specification of the powers authorized by section 11 of article XI of the constitution, namely, local police control. The legislature, by the act of February, 1911, evidently thought that police control of railroads by local governments should, so far as the character of railroad crossings was concerned, be withdrawn from local control and be given over to general state supervision. Los Angeles lost nothing that was peculiarly municipal; at most, what she lost was the local administration of a state affair.

As persuasive argument that the city did not have complete control over railroad crossings by force of the charter amendment of March 25, 1911, is a charter amendment of January 17, 1917, adding a new subdivision, which gives the city power "to require or provide for the elevation or depression, in whole or part, of railway or railroad tracks."[22] This argues that the people of Los Angeles did not conceive that the city already had control over railroad crossings. Of course, this amendment of 1917 is, in our view of the law, entirely ineffectual so far as it may purport to cover subjects embraced in the Railroad Commission Act of February, 1911; and, so far as it may intend to specify a municipal affair, it was quite unnecessary, for at the same time an amendment was adopted and ratified, which gives to the City of Los Angeles the control over all municipal affairs contemplated by section 6 of article XI of the constitution as amended on November 3, 1914. This comprehensive amendment of the Los Angeles charter reads: "To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter."[23]

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[22] Cal. Legislature, 1917, Assembly Concurrent Resolution No. 3.

[23] It is astonishing that other cities in the state have not pursued the course now adopted by Los Angeles of securing by a two or three line amendment all the privileges afforded by the amendment of section 6 of article XI of the constitution as adopted on November 3, 1914. All municipal affairs now belong to chartered cities by force of section 6. All

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(3) In the third place, we believe that sections 22 and 23 of article XII of the constitution as amended in 1911 invested the Railroad Commission with exclusive power over the place and manner of railroad crossings.

We have seen that the Railroad Commission Act of February, 1911, in section 15, invested the Railroad Commission with "exclusive power to determine and prescribe" every condition pertaining to the crossings between railroads and highways. And this act was ratified by the constitutional amendment of section 22 of article XII on October 10, 1911. Section 22 further declared that no provision of the constitution should be construed as a limitation upon the authority of the legislature to confer upon the commission "additional powers," an authority declared to be plenary and unlimited by any provision of the constitution. The Supreme Court has held that this empowered the legislature to grant to the Commission any power which is "germane or cognate to the purposes for which the Railroad Commission was created."[24] Now, indubitably, it is at least germane or cognate to the purposes for which the Commission was created to empower it to regulate railroad crossings. Therefore, section 15 of the Railroad Commission Act of February, 1911, so investing the Commission and thus ratified by the Constitution, might even be said to control and displace so far as it goes the municipal affairs clause of section 6 of article XI. If therefore the regulation of state railway systems within a city might be regarded as a municipal affair, it may well be admitted that the legislature through its "plenary and unlimited" authority could declare in whatever particulars it chose that such regulation should cease to be under the exclusive jurisdiction of the city.

Furthermore, section 22, by its adoption of the Railroad Commission Act, had, as to all the matters contained in that act, removed the exemption of section 23, reserving to cities control of public utilities already vested in them. This is made plainer by the concluding sentence of section 23; to-wit: "Nothing in this section shall be construed as a limitation upon any power con-

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police powers exercisable by a city are expressly granted by section 11. Under these two comprehensive grants, municipal charters may be made very brief.

[24] Pacific Tel. & Tel. Co. v. Eshleman (1913), 166 Cal. 640, 137 Pac. 1119, 50 L. R. A. (N. S.) 652.

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ferred upon the Railroad Commission by any provision of this Constitution now existing or adopted concurrently herewith." The power over railroad crossings had been clearly and fully given to the Commission and could not be withdrawn by any general exemptions or reservations.

Finally, the proviso in section 23, reserving to cities such control over public utilities as they chose to retain, said that "this section," that is section 23, should not affect such control. Now section 23 deals with the regulation of public utilities generally in their relation to the Railroad Commission, while section 22 deals with the organization of the Railroad Commission and its powers over railroads and other transportation companies. It is section 22 that incorporates the Railroad Commission Act of February 9, 1911, which, among other things, gave to the Commission exclusive control over the conditions of railroad crossings. So far then as the constitution is concerned, there is no reservation made to municipalities of control over the conditions under which railroad crossings may be constructed. Again, by amendment in November, 1914, the meaning of the reservation was made plainer, by saying that the section should not affect such powers of control over public utilities "as relate to the making and enforcement of local, police, sanitary, and other regulations." As is obvious, the phraseology is peculiar and is identical with the well-adjudicated phraseology used in section 11 of article XI. This last mentioned section grants to local communities power to make such regulations only so long as no general law exists. The conclusion is inevitable that the exemption was susceptible of removal by general law.

William Carey Jones.

Berkeley, California.

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The Extralateral Right: Shall It Be Abolished?

IV. CONCLUSION.

Growth of Opposition.

WHEN the first concerted attempt to abolish the extralateral right was made is uncertain. The Act of 1866 was adopted without serious opposition to this feature.[1] It is true that Julien in the House of Representatives attacked this idea of granting a right "allowing one man to run half a mile under the land of another" but he did this because of his bitter opposition to the bill as a whole and not because he had any special information on the subject. Instead of representing mining sentiment in the West, he was the chief exponent of the plan which had taken such a strong hold in the East of selling or leasing the mines to the highest bidder and devoting the proceeds toward liquidating the national debt. His opposition to the extralateral feature was due to his general attitude of hostility to the desire

[1] William M. Stewart who has been so frequently and unjustly charged with forcing the federal mining Acts of 1866 and 1872 upon an unsuspecting public took a leading part in the Comstock litigation during the early 60's. " . . . . it was his plan to induce the different companies on the lode to put an end to otherwise certain litigation by defining their surface lines or the boundaries of their claims accurately and finally. . . . . When the boundary lines were determined it was to be stipulated that planes should be drawn perpendicular to these lines, extending indefinitely downward and that the mining operations of all companies should be confined within the limits of the planes bounding their respective claims. . . . . Now this was substantially a relinquishment of the cherished but litigious principle which allowed a locator to follow the dips of his ledge indefinitely, and a substitution of the often-decried Spanish or Mexican system of allotment. . . . . Unfortunately, the trustees of the Choller Company could not be persuaded to adopt Mr. Stewart's views, and he was reluctantly obliged to abandon his project and continue the fight." This role of Senator Stewart as champion of the vertical boundary system will surprise many who have ignorantly charged him with having originated the extralateral right idea in America. Comstock Mining & Miners by Lord Monograph, IV U. S. G. S., p. 145.

The Eureka mining district of Nevada on February 27, 1869, adopted a resolution declaring that the mineral in that district was found in the form of deposits rather than in true fissure veins or ledges and "Whereas this deficiency in the law may give rise to expensive litigations," square claims with vertical boundaries were adopted. Tenth U. S. Census, Vol. XIV, pp. 551-2.

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of the West to have the long exercised right of free mining on the public domain recognized by positive legislation.

When the bill to amend the Act of 1866 was introduced in Congress in 1870 and 1871 and was finally enacted in 1872, no comment whatsoever was made on the extralateral feature during the course of the reported debates. Other provisions of the bill were extensively debated and altered but the section conferring the extralateral right remained unchanged and was not even criticised.[2]

Decided opposition to this feature of the mining law was definitely expressed, however, before the Act of 1872 had been in force many years. By Act approved March 3, 1879,[3] Congress authorized the appointment of a Commission to investigate the operation of the public land laws of the United States and make "such recommendations as they may deem wise in relation to the best methods of disposing" of such lands. A consideration of public mineral lands and the laws governing their disposition naturally came within the scope of the investigation of this Commission. This Commission made an elaborate report in 1880.[4]

Commenting on the creation of a new class of public lands in the United States; viz., mineral lands, resulting from the discovery of gold in California, the report states that the army of prospectors who roamed over the mountain ranges in quest of speedy wealth were not agriculturalists in search of homes but were composed of persons who desired to obtain title to mines.

> "As the region was a wilderness, and the authority of the general government was but imperfectly extended over the country, the miners framed for themselves regulations for their own government—crude, it is true, but in a general way securing justice. Under these local regulations or laws possessory rights to mineral lands were acquired which were afterwards confirmed by statutory law, and thus this second

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[2] There may have been some discussion in committee but these proceedings were not reported and the fact that the elaborately worded apex section granting the extralateral right remained unchanged throughout all this discussion when other features of the bill were being radically amended and, as finally adopted in 1872, the fact that this section was identical in language with the corresponding section of the bill that had been introduced in the previous session of Congress, leads to the conclusion that there was then no serious opposition to the extralateral right.

[3] 20 Stats. at L. 394.

[4] Pub. Land. Com. Rep. (Washington, 1880), 690 pp.

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class of lands was practically recognized in the administration of land affairs."

The Commission pointed out that if this land had been in private ownership the prospector would have been barred

> "and the mining industry which has so rapidly grown up in that country would have been delayed for years, perhaps for centuries. . . . .
>
> "Free exploration and the right to acquire property in mines by discovery led to the establishment of the great mining industries of the West. . . . . Thus a wise system of administering affairs relating to mining lands must recognize the importance of discovery in which poor men can engage. . . . . [5]
>
> "The United States mining laws of 1866 and 1872 are directly descended from the local customs of the early California miners."[6]

Investigating the operation of these mining laws which spread from California throughout the West and which "have stemmed the tide of Federal land policy and given us a statute book with English common law in force over half the land and California common law ruling in the other,"[7] the Commission called attention to the fact that east of the Missouri, mineral development was almost exempt from litigation growing out of conditions of the government conveyance of mineral lands while in the west it was "a history of the most frequent, vexatious, costly, and damaging litigation."

> "There are two general features in the existing statutes which have provoked and directed the main lines of legal contest, and they are, first, the recognition by the law of the local customs and regulations; second, the attempted conveyance of a lode, ledge or deposit of rock in place bearing mineral, as a thing separate from and independent of the surface tract of ground, with the permission to follow such lode or deposit on its dip, even when in the downward course it passes beyond the side lines of the surface claim."[8]

Pointing out the magnitude of the evil of allowing the mining communities the right of local regulation, the Commission urged that this source of endless litigation should be promptly abolished by Congressional enactment.

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[5] Id., pp. XIX-X.
[6] Id., p. XXXII.
[7] Id., p. XXXIV.
[8] Id., p. XXXV.

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Taking up the second great class of evils, "those incident to the theory of the lode or ledge location," the Commission makes the following comment:

> "It has proved in practice and in law that a lode or ledge is an absolutely indefinite thing, and the act of following this formation whose nature and limits can not be fixed beyond the locator's surface ground and under the surface ground of another owner, is the most frequent and vexatious cause of litigation."

This right to follow a lode into the ground of another works "a minimum of mischief in the case of a well defined fissure vein of regular course and dip."

> "With such a defined fissure vein, by spending many thousand dollars and provided his cloud of expert witnesses are not tripped up by clever cross-examination, and the judge is impartial, and the jury are not corruptly influenced against him, after many months and perhaps years, during which his enterprise has been hand-cuffed with injunctions and himself reduced to poverty, the owner might derive whatever hollow comfort he could from a victory which left him ruined."[9]

"From this somewhat favorable working of the law" the Commission went on with the examination of other classes of cases involving complex vein occurrences and pointed out the impossibility of reconciling these with the practical workings of the law of apex.

> "Your Commission, after a review of the lines of mining contests and a consideration of the complex nature of ore deposits, are unanimous in the conviction that any attempt on the part of the United States to convey such deposits as individual things beyond the vertical planes bounding the surface claim, must always end in a history of intolerable injustice."

It therefore recommended a repeal of the extralateral right and the substitution of the common-law system of vertical boundaries in its stead.[10]

The Commission submitted to Congress a draft of a proposed

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[9] This is rather a sorry picture and while somewhat overdrawn would indicate that some at least of the Public Land Commission had come in contact with extralateral litigation.

[10] Pub. Land Com. Rep. (Washington, 1880), pp. XXXVII-XLI. The fact that this commission included in its number such eminent men as Clarence King, Thomas Donaldson, J. W. Powell and J. A. Williamson, gave this report more than ordinary weight.

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Public Land law which contained among other provisions the following:

> "Section 169.—Any mining claims located after the—— day of — 1880, shall be bounded as to surface by straight lines, and all right to minerals contained therein shall be confined within vertical planes passing downward through said straight boundary lines."
>
> "Section 170.—A mining claim located after — day of ——— may equal but shall not exceed a square of ——— feet on the side, and the same may be in any shape, so that neither length nor breadth shall exceed —— feet, nor the aggregate area exceed that of the square hereinbefore first described."[11]

Concerning the area of the common law mining claim the Commission made no recommendation since it had not received "a full expression of popular opinion," and that question was remitted to the legislative judgment of Congress.[12]

Assuming that it were desirable to abolish the extralateral right, this was the most favorable time to have eliminated it. The Act of 1872 had been in force only eight years and to have wiped out the law of apex at that time would have resulted in infinitely less hardship and readjustment than must inevitably follow if that right be abolished after the Act has been in force for nearly half a century. Since this report of the Public Land Commission was issued, the attempt to repeal this feature of the mining law has been urged at intervals.[13] In recent years this sentiment has increased to such a marked degree, and the abolition of the right is now advocated by so many distinguished mining authorities and leading mining associations[14] that the subject demands serious consideration.[15] Most of this agitation, however, has thus far been entirely too much engrossed with partisan condemnation of the law of apex, while but slight consideration has been given to the principles underlying the origin and exercise

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[11] Id., p. LXXVIII.

[12] Id., p. XLI.

[13] See the files of the Mining & Scientific Press and Engineering & Mining Journal.

[14] Senate Document No. 233 (64th Congress, 1st Session). Report of Meeting of the Mining & Metallurgical Society of America in collaboration with the American Mining Congress, the American Institute of Mining Engineers, etc.

[15] There were several bills introduced in the 64th Congress, providing either for the outright repeal of the extralateral right or profoundly amending the mining law in many respects.

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of the right and those features which furnish some measure of justification for its existence; and, most important of all, practically no thought has been directed to the consequences which must inevitably flow from an outright repeal. These consequences are exceedingly vital and far reaching and, unless the anti-extralateral advocates can furnish some practical solution which will minimize the mischief, the advocacy by many of them of outright repeal of the extralateral and discovery features of the mining law without a corresponding readjustment of our public land laws all along the line to meet this sweeping change, is going to produce results which will be most detrimental to the mining industry.

THE EXTRALATERAL RIGHT PRINCIPLE IS IDEAL IN THEORY.

It is generally conceded that the fundamental principle of the extralateral right is ideal in theory. The statements of those who have analyzed the situation surrounding the occurrence of lode or vein deposits and who have pointed out the lack of any essential relation between veins or mineral deposits in depth and the overlying surface amply support the principle of severance.[16] All that one has to do is to picture a vein dipping at an angle into the earth and visualize the result of vertical planes passed through surface boundaries cutting off the right to mine on the vein in depth at various points. Take the case where there are several veins dipping either parallel to each other or at varying angles and realize the complex condition that would result if overlying surface ownership controlled and vertical planes were projected downward to chop these veins up into segments of varying size and at different depths. Then conceive of the ideal condition under the extralateral law where the apex proprietor can follow a certain length of vein down indefinitely on its dip no matter where it leads. The practical result where veins are controlled by surface ownership and chopped up into segments of varying size and at varying depth is to bring about an attempt to consolidate the right to mine on the vein and thus sever the underground rights from the surface rights and make them independent of one another. Only by this means can veins be most economically operated. The intent of the extralateral law was to ac-

[16] 4 California Law Review, pp. 371-374, 388; 4 California Law Review, pp. 456-458.

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complish this result in the first instance and avoid the necessity of subsequent consolidation, and hence the extralateral law is based on the fundamental conception of economic operation.

But, unfortunately, though the extralateral law is ideal in theory, it is far from ideal in practical results. If veins were ideal, with regular width and dip and strike, the extralateral law would work to perfection and no one could seriously advocate any change. Veins are, however, so complex in their occurrence with branches, faults, splits, junctions and every conceivable variation in strike and dip and width, and degree of mineralization, that no matter how well the law of the extralateral right may become settled, there will always be disputes arising over these physical vagaries.[17]

The candid investigator must admit that because of this situation the extralateral law is open to serious objection. Just how serious these objections are and whether they justify such drastic action as an outright repeal of this feature of the law will next be considered.

THE MAIN REASON FOR ELIMINATING THE EXTRALATERAL RIGHT.

If we analyze the arguments advanced by those who advocate abolishing the extralateral right, we find that they practically all resolve themselves into the objection based on an excessive amount of litigation.[18]

It has been assumed by most of these critics without investi-

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[17] "We propose to abolish the law of apex not because the theory is objectionable but because the question of physical fact gives rise to never ending litigation." Victor G. Hills, in Transactions of American Institute of Mining Engineers, Dec. 1916, p. 2200.

[18] A critical examination of the statements made by those who are opposed to the retention of the extralateral right as reported at the meeting of the Mining & Metallurgical Society of America (Dec. 16, 1915) discloses that the main reason advanced for the repeal of the law was "continuous litigation," "uncertainties of title and litigation," "vexatious and most burdensome litigation," etc. See Senate Document No. 233 (64th Congress, 1st Session); also Bull. No. 91, Vol. VIII, No. 12, Mining & Metallurgical Society of America. See also the expressions of opinion contained in Transactions of the American Institute of Mining Engineers, Vol. XLVIII, pp. 368-371, in paper entitled "Why the Mining Laws Should Be Revised," by Horace V. Winchell.

Aguillon in Legislation des Mines Etrangere (1891), Vol. II, p. 292, mentions the historical lawsuits which have arisen in America through the right to follow mineral deposits downward indefinitely under adjoining surface.

"The law of the apex has proved more productive of expensive litigation than economical mining." Annual Report of Director of U. S. G. S. (1911), p. 15.

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gation that extralateral litigation is a common occurrence in the various mining camps and has become a great burden which is seriously hampering the mining industry. A careful examination of the statistics leads one to believe that the real situation has been exaggerated. There has been much expensive litigation but it must also be borne in mind that because of the magnitude of the interests involved, such mining cases attract more than their due share of public attention.[19] Taking into consideration the immense importance of the mining industry and the fact that its operations are spread over such a vast territory in the West, the wonder is, not that there are so many extralateral cases arising, but that there are comparatively so few. A careful analysis of the law reports and tabulation of all extralateral cases appearing therein[20] indicates that during the years 1870-1916 inclusive, in all of the western states there has been an average of less than three extralateral cases per annum which have been reported.[21]

The reported cases do not, of course, include all the extralateral cases which have arisen within this period, but they do include the more important cases and afford a very reliable criterion of the proportion of cases arising in the various years. The tabulation indicates that the maximum of reported cases was reached in the year 1902 when ten cases were reported.[22] Since 1902 the number of reported cases has steadily decreased so that for the past decade, excluding duplications of the same case, extralateral litigation has not averaged two reported cases a year. During the years 1908 and 1911 there were no extralateral cases whatever reported.

The federal extralateral decisions of the trial courts usually find their way into the reports because of their importance. The extralateral decisions in the state trial courts are not found in

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[19] In a similar way, because criminal trials are heralded with head lines in the daily press, it is little wonder that the erroneous idea is prevalent that the legal profession devotes the greater part of its time to criminal law.

[20] The writer acknowledges his indebtedness to Mr. Herbert C. Hoover for permission to use material which was tabulated at his request by Mr. Robert M. Searls of the San Francisco Bar. Mr. W. J. Aschenbrenner, also of the San Francisco Bar, has continued this tabulation to date.

[21] This estimate does not include the decisions on appeal from lower courts where the same case is reported below, since these appellate decisions would represent a duplication of cases already considered.

[22] Many of these arose out of the Heinze-Anaconda battles in Montana and most of the remainder were connected with the Cour d'Alene crop of litigation.

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the reports but these cases are of such magnitude that they often reach the state appellate courts. The tabulation, therefore, includes practically all of the extralateral cases which have arisen during the past forty-five years, except the few cases which were not carried beyond the state trial courts. It is, of course, impossible to arrive at the exact number of these unreported cases and determine the percentage they bear to the reported cases, but judging from actual information obtained in many of the important western mining states, it is doubtful if the number of these unreported cases arising in the state courts would much exceed twenty-five per cent of the total number of reported cases. This would increase the average number of extralateral cases arising during the past forty-five years to slightly in excess of three cases per annum. Even assuming that the average number of unreported cases were equal in number to the cases actually reported, the total annual average would be less than six cases, with the past decade showing a material decrease even in this small number.

It would hardly seem that these few cases arising in the entire West, especially where an industry of such magnitude and importance as that of lode mining is involved, would justify the extravagant statements that have been made by some who urge the abolition of the right.[28] It must be remembered that this charge of excessive litigation is the main reason urged for repealing the "law of apex."

The deductions of the writer as to the comparatively small amount of extralateral litigation which has arisen, when we consider the vast number of lode mines being operated throughout the West under the extralateral law, is corroborated by an independent line of investigation made by Charles H. Shamel, the author of "Mining, Mineral & Geological Law." Proceeding along entirely different lines, he examined the syllabuses of all of the cases reported in Morrison's Mining Reports which contain all of the important mining decisions reported in the United States during the past half century. He arrived at the following result:

[28] The comparative infrequency of extralateral cases is illustrated by the fact that no extralateral case has yet appeared in the reports from Alaska, and thus far only one has been reported from Arizona. In California, which was the birthplace of the law of apex, the reported cases have averaged one for each three-year period during the past forty-five years. During the past decade there has been no reported case arising in California. Two unreported cases have been tried and decided in California during that period.

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> "I confess that I was surprised at the actual figures. The total number of syllabuses in the 22 volumes of decisions is 5,808, of which the number concerning the apex law is 115. The apex cases are only about 1.9 per cent of the whole. . . . . Instead of causing 99.9 per cent of mining litigation, as Dr. Raymond has somewhere stated, it has caused much less than its proportionate share of the trouble. Facts are stubborn things. The chief, the constantly reiterated, the convincing argument, against the apex law is based on a gross mistake as to the facts in the case."[24]

Hon. Charles S. Thomas, one of the United States senators from Colorado, who, as an eminent mining attorney is well qualified to speak on the subject of mining litigation, corroborates this view as to the ratio of extralateral cases as compared to general mining litigation. He says:

> "Now the vast amount of mining controversy—and I am speaking of numbers of actions—has not been apex litigation. They have been the most expensive and the most far reaching. They have perhaps resulted in the greater proportion of injustice; but the conflicting (surface) locations have produced that multitude of cases, a small percentage of which perhaps reach the Court of Appeals, but whose aggregate has burdened the prospector and locator with an expense almost unbearable."[25]

It is not therefore an excessive amount of litigation which can be legitimately charged to the extralateral right, for the actual number of cases arising is surprisingly small—insignificant even, when compared with the vast number of claims exercising this right—but rather, the only valid charge on this score which can be made, is the great expense incident to such few cases as arise.[26] Valid criticism must be based on expensive litigation and not on the ground of excessive litigation.

Practical Difficulties of Revision.

The advocates of the repeal of the law of apex have given but little consideration to the serious consequences which will in-

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[24] "Should the Apex Law be now Repealed?" Transactions of the American Institute of Mining Engineers, Vol. XLVIII, p. 312.

[25] Senate Document No. 233 (64th Congress, 1st Session), p. 65.

[26] The vast amount of costly litigation arising in the oil fields of California is strong proof that the vertical boundary system is not immune from this evil. Shamel cites the famous litigation involving vertically bounded zinc deposits in New Jersey, lasting for nearly half a century. Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 347.

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evitably result unless other features of our public land law are simultaneously profoundly amended.

The greatest practical difficulty which will follow from abolishing the extralateral right and confining a locator to the mineral found within the vertical boundaries of his location, is the fact that only in those locations which embrace the apex of the vein can a discovery of mineral be readily made. Discovery of mineral within the boundaries of the location is the most vital essential of our existing mining law.[27]

Locations which include the apices or upper portions of the veins within their boundaries could still readily meet this important requirement of discovery, but surface locations overlying the dip of the vein at considerable distances from the apices or upper terminal edges of the veins could meet the discovery requiremnet only after the locators had expended considerable labor and time in sinking shafts to encounter the vein in depth. As the vein dipped further into the earth it would be increasingly difficult to make a discovery within the vertical boundaries of the overlying locations and finally at great depth the expense of sinking of such shafts would be absolutely prohibitive. It would be necessary under existing discovery requirements to sink vertical shafts on each surface location in order to perfect a discovery on each claim and there would be a consequent economic waste resulting from the expense of unnecessary duplication of such shafts. Under the extralateral law as it now exists a discovery on the apex of the vein is sufficient and the vein may be developed to great depth by a single shaft advantageously situated.

The consistent advocates of the abolition of the extralateral right cheerfully concede that this practical difficulty is a serious one and they are therefore forced to urge that the discovery re-

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[27] "Discovery is the all-important fact upon which title to mines depends." Lawson v. United States Mining Co. (1907), 207 U. S. 1, 13, 52 L. Ed. 65, 28 Sup. Ct. Rep. 15. Discovery is the initial fact without which no rights to mineral lands can be acquired. Creede and Cripple Creek M. and M. Co. v. Uinta T. M. & T. Co. (1905), 196 U. S. 337, 345, 49 L. Ed. 501, 25 Sup. Ct. Rep. 266. Discovery is the source of title to mining claims and the first discoverer must be protected in the possession of his claim. "Otherwise, the whole purpose of allowing free exploration of the public lands for the precious metals would in such cases be defeated, and force and violence in the struggle for possession, instead of previous discovery, would determine the rights of claimants." Ehardt v. Boaro (1885), 113 U. S. 527, 535, 28 L. Ed. 1113, 5 Sup. Ct. Rep. 560.

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quirement of our mining law be abolished also.[28] Those who are familiar with the main features of our existing mining law will at once appreciate that if these two fundamental features—discovery and extralateral right—are eliminated, that our system of American mining law built up as a result of the years of experience and intelligence of the practical pioneer miners will have been virtually emasculated. Very little more than an empty shell will remain.

Let us pause for a moment to examine critically just where this radical alteration will lead. Many critics have stated that the discovery requirement is a feature characteristic of American mining law exclusively and that it is a useless requirement unnecessarily suffered by the American miner. Both of these statements are erroneous. The discovery requirement is characteristic of most of the systems of mining law in the world.[29]

The elimination of the discovery feature from our law would wipe out the simplest and most practical form of test as to whether land is mineral or not. As the writer has already pointed out in an article discussing the proposal to abolish the discovery requirement,[30] it would be a grave mistake to eliminate this salutary provision from our law. Such elimination would destroy the simple test whereby mineral lands are now practically and easily classified under existing law so that mineral locators are able to readily defeat agricultural claimants desiring to obtain the same lands. The only alternative test that has been suggested would be to leave such classification to an appropriate branch of the Federal Government. Even this alternative would be open to serious objection. It would substitute the opinion of mineral experts and representatives of the Federal Government as to mineral character of land in place of the views of the practical miner; it would mean aggravating delays where mines were dis-

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[28] "You cannot abolish the extralateral right without abolishing the right of discovery. They are all tied up together." Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 383.

[29] "Discovery in all ages and all countries has been regarded as conferring rights or claims to reward. Gamboa, who represented the general thought of his age on this subject, was of the opinion that the discoverer of mines was even more worthy of reward than the inventor of a useful art. Hence, in the mining laws of all civilized countries the great consideration for granting mines to individuals is *discovery*." Lindley on Mines, p. 335.

[30] "Revision of the Mining Law—Discovery," 3 California Law Review 191; Mining & Scientific Press (Feb. 7, 1914), Vol. 108, p. 246.

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covered in rugged or desert regions remote from centers of travel; it would overturn a fundamental principle which was embodied in our mining laws by the pioneer miners, a principle which was already the heritage of ages of mining experience; and finally it would tear down and destroy to a large extent the great body of law that has gradually been built up with infinite patience and practical wisdom as a result of judicial interpretation operating through more than half a century. The law of discovery is now well settled and understood and to substitute for it an unknown and untried quantity would mean another period of uncertainty and litigation until a similar line of interpretative decisions had been rendered with respect to the new law. This superstructure of judicial interpretation is as important a part of the law and is as necessary for its satisfactory working as is the organic law which it interprets. It is even more important in one sense, for the organic law may be created "overnight" as it were, while the interpretation and harmonizing of this organic law, especially in its relation to other laws, necessarily takes years to accomplish.

Another practical difficulty to which the elimination of the extralateral right will give rise and which must not be overlooked is the fact that in certain of the western states condemnation of private rights of way for mining purposes is not permissible.[31]

The courts of these states have not taken the broader view followed in other states where it is held that the public welfare is so dependent upon the mining industry that a private mining operator can exercise the right of condemnation for rights of way for mining purposes.[32]

The practical effect of the abolition of the extralateral right in those states which deny the miner such a right of condemna-

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[31] Inspiration Consolidated Copper Co. v. New Keystone Copper Co. (1914), 16 Ariz. 257, 144 Pac. 277; Consolidated Channel Co. v. Central Pacific R. R. Co. (1876), 51 Cal 269; Lorenz v. Jacob (1883), 63 Cal. 73; Amador Queen Mining Co. v. Dewitt (1887), 73 Cal. 482, 15 Pac. 74, County of Sutter v. Nicols (1908), 152 Cal. 688, 694, 93 Pac. 872; Const. of New Mexico, § 22; Const. of North Dakota, Art. 1, § 14; Const. of South Dakota, Art. VI, § 13; Const. of Washington, Art. 1, § 16, Art. XII, § 10.

[32] People v. District Court (1888), 11 Colo. 147, 17 Pac. 298; Baillie v. Larson (1905), 138 Fed. 177; Ellinghouse v. Taylor (1897), 19 Mont. 462, 48 Pac. 757; Dayton Gold and Silver Mining Co. v. Seawell (1876), 11 Nev. 394, 408; Overman Silver Mining Co. v. Corcoran (1880), 15 Nev. 147; Byrnes v. Douglass (1897), 83 Fed. 45; Strickley v. Highland Boy Gold Mining Co. (1906), 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301. For an excellent discussion of these divergent holdings, see Lindley on Mines, §§ 253-264.

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tion would be to render him unable to operate as one mine two separated segments of the vein underlying two separated parcels of surface land owned by him where the intervening surface owner objected. Under existing extralateral law he has the right to follow his vein on its dip irrespective of surface ownership overlying the dip.[88]

Another consequence of the elimination of the extralateral right would be to make the ownership of overlying surface all important. Under existing law the extralateral claimant frequently is willing to make a material concession to his neighbor when it comes to a dispute as to the ownership of surface of a portion of his claim. If the surface in controversy does not include any portion of the apex of the vein, the surface right frequently does not assume sufficient importance to justify litigation and controversies are usually amicably settled or the surface proprietor bought out for a comparatively small sum. If the right to the vein should become entirely dependent upon surface ownership, as is the result where no extralateral right exists, it is obvious that surface title becomes so vital that surface disputes would materially increase in number and be contested far more bitterly than in the past. The inevitable result would be to create an additional crop of surface litigation to take the place of extralateral litigation.

Practically all of the states of the West have also legislated on the subject of mining law, supplementing the mining laws of Congress. Most of these have embodied in their legislation the extralateral provisions of the federal statutes. While action by Congress abolishing the extralateral right would doubtless have the effect of rendering these state statutes on the same subject inoperative, yet it would become necessary for each state to wipe this legislation off its statute books and harmonize its laws with the enactments Congress might see fit to substitute therefor.

The writer does not pretend to assert that these obstacles are insuperable, but calls attention to them for the purpose of showing that the repeal of the extralateral law is going to be attended by far-reaching results. No attempt has been made to exhaust the field of objectionable consequences which will flow from such a

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[88] Lindley on Mines, § 568.

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repeal and as a matter of fact many serious results would only become apparent years after the experiment had been put in operation.

Unavoidable and expensive litigation is admittedly a valid objection to the continued existence of the extralateral right. But we are not confronted by the simple situation which existed prior to the adoption of this right to follow the vein into the depth. If we could erase the slate and start anew in the light of our present day experience, there would be little room for argument that the vertical boundary system, while opposed to the natural economics of mining, would obviate much expensive litigation and on the whole be desirable. But, unfortunately, we can not start anew and we are confronted with the practical situation that during the past sixty-seven years there have been thousands upon thousands of claims located and patented under the law granting extralateral privileges with which we must reckon, as it is inconceivable that any rights already vested will be destroyed.

To have two fundamentally opposed systems of mining law operating side by side, one based on the principle of severance of mineral from the surface and the other based on surface ownership carrying with it the right to everything situated vertically beneath, would not tend to a simplification of our mining laws nor to their ready understanding by those who would avail themselves of their benefits, but would inevitably add an increasing number of problems to be litigated in the courts.[84]

The fact that the primary questions involved in the interpretation of the extralateral feature of the Mining Act have largely been set at rest by the Supreme Court of the United States is reflected by the diminishing number of cases involving extralateral rights which are presented to the courts each year, and this in spite of the continually increasing number of locations and operating mines where such questions might be raised. There are questions of extralateral right law still undetermined but these are becoming fewer in number each year. Most of the important

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[84] "The apex theory of tracing title to a lode has led to much litigation and dispute and ought not to have become the law, but it is so fixed and understood now that the benefit to be gained by a change is altogether outweighed by the inconvenience that would attend the introduction of a new system." From President Taft's Speech at Conservation Congress, Minneapolis, Sept. 5th, 1910.

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questions have been adjudicated. Because there are still some problems awaiting determination is not a valid reason for wiping out the great framework of judicial construction of the apex statute which has been built up during half a century.[35] Time will serve to eliminate virtually all of the questions of strict law which may arise over this subject but we cannot, of course, eliminate the questions of fact as to continuity and identity of vein occurrences which arise wherever complex vein conditions exist. Such extralateral questions will continue to arise and the great expense incident to the trial of these problems is admittedly a grave objection to the continued operation of the law of apex. But these cases will arise in any event in connection with rights already vested and a repeal of existing law will not eliminate any extralateral rights which came into existence theretofore.

Many of those who favor revision of our mining laws seem to have the idea that if a particular law gives rise to litigation all that has to be done to remedy the situation is to amend the law or substitute a new law in its place and that litigation will cease automatically if the proper kind of a substitute law is devised. Unfortunately, such an ideal result is seldom if ever attained in actual experience. Until the expression of ideas by means of language has been reduced to an exact science and all people think in the same terms, it is not possible for radical legislation to be enacted which will not in its turn have to run the gauntlet of attack based upon every conceivable ground that human ingenuity can devise.[36] The disposition of public mineral lands presents a complex problem and the dovetailing of such a law in with all the other public land laws is no easy task. In innumerable instances a new law must come in conflict with rights that have vested under the older mining law which it will supplant and we are certain to have a new crop of litigation that will

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[35] "The large number and wide range of the decisions show that the value of mining laws depends on their status as established by the courts. . . . ." Annual Report of Director of the Bureau of Mines (1915), p. 35.

[36] "They [the elements of decision contained in the mining statute] are simple enough in expression but the contests of interest and ingenuity, induced or justified by physical conditions, have given rise to much litigation, and quite a body of jurisprudence has been erected in the exposition of the rights conferred by the statute. The number and fullness of the cases spare us much discussion." Stewart Mining Co. vs. Ontario Mining Co. 237 U. S. 350, 357-8.

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unquestionably persist for years. The vital question is whether the benefits to be derived from a change in the law will eventually outweigh the hardships and uncertainties of this unavoidable period of statutory interpretation and readjustment.

A Suggested Remedy.

As a matter of fact the situation can be met in another way and valid criticism based on the expense of extralateral trials overcome to a large extent by reform in the present objectionable methods of handling such cases.[37] It is admitted that the reform would have to be radical but it is worth considering, for the extralateral right is bound to be the subject of adjudication in the future, as in the past, at least, as far as existing vested rights are concerned.

In each state there should be a provision added to its laws whereby a judge, specially qualified to try extralateral cases, could be called in to sit where such rights are involved. To the average judge an extralateral suit is like so much Greek and a large portion of the trial is taken up with educating the court on the elementary principles involved. Most of the mining laws of other countries recognize the fact that mining cases involve technical problems that can not be satisfactorily and intelligently adjudicated by the regular courts and, consequently, in practically all foreign countries a special tribunal is established to try mining cases.[38] In some countries jurors, even, are required to be experienced in mining.

Another objectionable feature which can be readily improved, is the present method of employment by each side of an army of experts.[39] Practically all extralateral cases resolve themselves,

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[37] As Charles Shamel says: "The fault lies not with the apex law, but with the existing instruments and methods of legal procedure." Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 34.

[38] Any one who was familiar with the trial of mining cases in the federal courts before judges like Hawley or Hallett, who thoroughly understood these technical mining problems, will appreciate the great saving of time and expense which would result from the trial of technical cases by a specially qualified judge.

[39] The employment of experts in extralateral litigation is not an unmitigated evil. In many cases ore bodies of considerable value have been encountered as a direct result of litigation work or suggestions of the experts and in many mines the geological conditions are slighted and but poorly understood until an extralateral suit is instituted and then the first scientific information of value is obtained concerning a mining camp.

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sooner or later, into a battle between opposing experts. This results in great expense as well as confusing exaggeration of structural details of minor importance. In a great majority of cases justice could be as readily obtained by a board of experts, one to be selected by each side and a third by the judge of the court, the expense to be shared equally by each party. These experts could examine the properties involved and make a report on the geological occurrences. They would agree on most facts, and where there was a difference of opinion litigation work could be ordered to further develop the points of difference. This plan would eliminate much of the expense and time consumed in such trials. The court would accept the facts agreed on as proven and confine the trial to disputed issues. This plan or some other framed along similar lines would do much to remove the stigma of an excess of expensive litigation to which the extralateral right is now properly subject. It would tend to minimize the existing evil which will still continue to abide with us in the case of all existing claims and would obviate a plunge into untried dangers and hazards which are bound to follow a radical change in our present law.

If it is litigation we wish to avoid, then why not also take up the question of compelling all locations in the future to conform to legal subdivisions.[40] By requiring lode claims to be located in conformity to public land surveys as is now required in the case of placers and also by registering all locations in the land offices, it will readily be seen that a vast amount of litigation arising by reason of conflicting surface rights would be eliminated. An amendment of the mining law as suggested would eliminate ten-fold as many cases as would be eliminated by abolishing the extralateral right. But by each of these remedies the advantage of economic operation of the ore deposit as a geological unit would be sacrificed. The vein on its dip into the earth has nothing in common with the surface and to parcel it out by surface area and vertical boundaries is a structural misfit and so would be the forcing of lode locations into rectangular surface areas conforming to the public land surveys. Such reforms are ideal from the standpoint of minimized litigation but

[40] This is not a novel suggestion. See Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 422.

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intensely impractical from the standpoint of the most economic mining of the ore deposits.

Most Countries Recognize Severance of Minerals From Surface.

One vital point must not be overlooked in this discussion. Most of the mining laws of other countries recognize severance from the surface itself of minerals lying underneath the surface.[41] The owner of the surface does not usually own the minerals lying in depth beneath his surface but a separate property exists in these underlying minerals which the state may grant to another person. As a result there is no serious conflict between the surface owner and the individual who is entitled to work the mineral deposits beneath the surface. The law of ownership of lands acquired on the public domain of the United States, on the contrary, only recognizes such severance to a limited extent.

Recent legislation by Congress does permit agricultural entry of lands valuable for coal, oil, gas, phosphates, nitrates, potash and other non-metallic minerals.[42] "Known lodes" are also excepted from placers[43] and "known mines" from townsites.[44]

The agricultural patentee is further safe-guarded in this country by a statute of limitations, which provides

> "that suits to vacate and annul patents thereafter issued shall only be brought within six years after the date of issuance of the patent.[45]

Not only does this statute of limitations operate to cut off a mining claimant's opportunity to acquire mineral already known to exist in patented agricultural ground but rulings of the Supreme Court of the United States and of various state courts have thrown additional protection around agricultural claimants so that after their *bona fide* entry on land under non-mineral public land laws

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[41] Severance of underlying minerals from the surface and their segregation into distinct titles is characteristic of the laws of France, Belgium, Holland, Spain, Austria, Germany, portions of Italy, Greece, Norway, Sweden, portions of Russia, Canada, Australia, Japan, and most of Spanish America.

[42] See 3 California Law Review, p. 288, n. 45, in article entitled, "The New Public Land Policy."

[43] U. S. Rev. Stats., § 2333.

[44] U. S. Rev. Stats., § 2392.

[45] As to patents theretofore issued, the period of limitation was five years after the passage of the Act. Act of Congress approved March 3, 1891, 26 Stats. at L. 1093, § 8. See Lindley on Mines, § 784.

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has been made, it is difficult for a mineral claimant to make a valid adverse entry on the same land.[46]

In other words, when the United States grants non-mineral title to land it is usually in practical effect an outright grant of all that the land contains. There is no dual ownership contemplated except in the few limited cases noted. Anyone who recognizes these advantages which the agricultural claimant now possesses in this country as against those desiring to acquire the mineral existing in the same lands, will appreciate to some degree, at least, the hardship which is going to result to the miner if the extralateral right is abolished without the simultaneous enactment of legislation designed to offset this difficulty. The inevitable result of an outright elimination of the extralateral right will be to feed all existing agricultural patents which have veins dipping beneath them with all such extralateral segments of such veins situated vertically beneath these agricultural patented lands, since such segments will fall by gravity into and become merged with the ownership of the overlying surface lands.[47]

Some may argue that this is a desirable result. It is doubtful whether the mine operator and prospector will enthuse over such an outcome. To allow minerals to pass into agricultural ownership is not going to facilitate the extraction of minerals from the soil. These two fundamental industries have many points of difference. The destruction of soil by actual removal thereof or deposit thereon of tailings, necessary in so many instances in actual mining operations, and the destruction of vegetation resulting from reduction and smelting processes has made the average agriculturist apprehensive and difficult to persuade that mining in his immediate vicinity is always for his best interests. Neither has the agriculturist any adequate conception of the true value of a mine and is inclined to place on the mineral existing within his ground an exorbitant and exaggerated price based on gross output. He does not take into consideration the vicissitudes of

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[46] See Lindley on Mines, §§ 206-208, 77.

[47] While there is a difference of opinion on the subject, the weight of reason and views of the text writers support the contention that a miner who locates the apex of a vein within ground that is open to location, even though his location is made later in time than the date of the patent to agricultural land which overlies the dip of the vein, may follow his vein extralaterally underneath the prior patented agricultural surface. Lindley on Mines, § 612.

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mining operations and the difficulties which must be overcome before a mine can be put on a paying basis. The abolition of the extralateral right will further fortify the farmer in this position and make him increasingly hard to deal with. With the extralateral right in existence, the agricultural surface owner can now be usually induced, for a small consideration, to part with any claim he may assert to underlying mineral rights, for he is aware of the right of the lawful apex proprietor to follow the vein and penetrate beneath his land without his consent. It will be quite a different matter to deal with him when he realizes that he has become the actual and undisputed owner of the vein situated vertically beneath his surface.

The Extralateral Right is Based on the Principle of Severance.

The main exception in the public land law of the United States existing today which takes the place of severance in other countries, is the right of the owner of a valid lode location embracing the apex of a vein to follow the vein extralaterally underneath adjacent surface. In other words, the extralateral feature of American mining law operates to segregate mineral deposits in the nature of lodes or veins from the surface land overlying the dip of such veins or lodes.[48] The practical result of abolishing the right to follow a vein extralaterally and confining the locator to his vertical boundaries and of also abolishing the discovery requirement would be that agricultural claimants could readily file on and enter upon land overlying the dip of the vein. Under our existing land laws there is no way to prevent such action unless the Land Department can be persuaded to withdraw the land from agricultural entry pending its classification which would be manifestly impossible in every instance, as well as interfering with bona fide acquisition of agricultural titles. With the extralateral law in force, the locator can locate a claim embracing the apex of the vein and make a valid discovery on the portion of

[48] "The Act of 1866 was in effect a proclamation severing veins and lodes of the character specified from the body of the public domain. It was the announcement of a governmental policy, whereby ledges within the earth were to be considered as distinct entities, and to be dealt with as such in administering the public land system. This policy has never been entirely changed. In the main it is as much a part of the existing system as it was of the one which it succeeded." Lindley on Mines, § 568.

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the vein which is nearest to the surface. This serves to carve out the vein on its dip beneath agricultural land and it is usually immaterial whether the agricultural claimant acquires title to the surface overlying the dip or not. Abolish the extralateral right and it becomes difficult and in many cases impossible to discover mineral within the vertical boundaries of claims overlying the dip of the vein. Agricultural claimants might be first on the ground and under the land laws as now interpreted they could prevent prospective locators from coming on the ground for the purpose of making a discovery. As already pointed out, discoveries perfected by sinking shafts to encounter the vein in depth, even if made without opposition, become economically wasteful and undesirable.

The Only Logical Alternative is to Sever Minerals From Surface.

After giving this subject serious consideration for a number of years it is the writer's deliberate opinion that, if any change is to be made in existing law and if conditions are to be improved rather than made worse, instead of abolishing the extralateral right principle, it should be carried even further by amendment of our public land laws providing for the severance from surface lands of all minerals except superficial deposits. Surface lands could be disposed of under existing laws providing for the acquisition of agricultural and other non-mineral titles except that the mineral should be permanently reserved from such surface grants. As the law now stands, and as has already been noted, only minerals known to exist at the date of the agricultural grant are reserved and even such minerals become the property of the surface proprietor by virtue of the existing statute of limitations and also the additional protection thrown by the courts about a surface proprietor in possession.

By reserving minerals from agricultural lands and allowing the miner the right of entry for purposes of prospecting under restrictions with the added requirement that the surface proprietor be compensated for damage, the interests of both the miner and the agriculturist would be conserved. In all the important mining countries of the world this segregation has taken place and this is the reason why in such countries the extralateral principle is not essential, whereas, in the United States, without such segre-

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gation or severance of minerals from the surface, the extralateral right has a most powerful additional reason for existence. With severance of minerals and segregation of agricultural and mineral interests, the element of discovery also, now so vital in the mining law of the United States, would assume secondary importance. Discovery instead of being of prime importance, as of necessity it must be under existing law where no segregation of minerals from the surface exists, could be made a secondary requisite, only required after the mineral locator had plenty of time in which to make a discovery, taking into consideration the difficulty of so doing in particular cases. If the principle of severance is incorporated in a revised public land law, a vertical boundary system for the acquisition of mineral lands could be simultaneously adopted without resulting in great hardship to the miner, for the agricultural surface claimant could no longer claim the underlying minerals. The surface perimeter within which the miner could work should be so adjusted as to give him as much opportunity as possible to mine in depth on the vein. This would in effect be an adoption of the French system of mining law. However, a radical change of this sort would unquestionably result in increased supervision of mining operations by the Federal Government and conversely a material sacrifice of individual control over such operations.[49] It might even result in permanent reservation by the Federal Government of all minerals, both metalliferous as well as non-metalliferous, and their disposition under a leasing system. This would be in line with the new public land policy as evidenced by recent acts of Congress and of the executive branch of the government which have been upheld by the United States Supreme Court.[50]

Whether such segregation is at this late day practical is a question that can only be determined after it has been thoroughly considered from every standpoint. As already noted, the Federal Government has provided for such severance in the case of lands containing coal, oil, gas, phosphate and similar minerals and it may be that the experience derived from the practical development of such lands will aid in determining this serious problem when applied to the metalliferous minerals.

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[49] This is conspicuous in the administration of the French mining law. 4 California Law Review, pp. 373-374.

[50] 3 California Law Review, pp. 269-291.

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The suggestion that severance of minerals from the surface will solve many of the difficulties standing in the way of the outright abolition of the extralateral right is not new. The logic of the situation has caused others to advocate the change.[51]

The severance of surface title from the underground minerals would also discourage speculators and blackmailers who now fraudulently seek to acquire title to surface lands under agricultural laws in order to levy tribute upon the bona fide mining operator. There are many problems that would have to be carefully considered if such a material change were made in our

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[51] "The one great thing which would do away with all of our troubles on the discovery question, and also a lot of other mining law troubles, is the divorce of surface and mineral titles. . . . . The use of the surface and the extraction of minerals do not, except to a limited extent, naturally belong together, and any law which persists in keeping the two inseparable must be full of injustice and trouble brooding." Victor G. Hills in Transactions of American Institute of Mining Engineers, (Dec. 1916), p. 2202.

An able paper entitled "The Segregation and Classification of the Natural Resources of the Public Domain," by Frederick F. Sharpless appears in the Transactions of the American Institute of Mining Engineers, Vol. XX, pp. 386-400. The author points out the many advantages of segregating the surface from the mineral title and calls attention to the fact that: "In nearly all of the Provinces of Canada, there are three distinct rights in every parcel of land—timber rights, mineral rights and agricultural rights. . . . . In Australia, the segregation of surface from mineral rights has been the custom in most of the colonies for many years. . . . . While segregation of surface from mineral rights would not cure all existing difficulties connected with our present mining laws, it would, because of the very different nature of these rights, simplify the application of remedies."

After the main report of the Public Land Commission had been submitted to Congress, Maj. J. W. Powell, one of the Commission, qualified his approval of the report by adding a provision in the case of certain agricultural lands classified by the commission as pasturage lands, that "all subterranean mining property and rights for mining purposes, are hereby severed from the surface property," and that in the case of all such patents issued, the same reservation should be inserted and the property "shall be servient to the easements necessary for discovering and working mines therein." He also urged that in the case of mineral lands every patent should have inserted the following clause: "Except and excluding from these presents all surface property rights, provided that there shall be dominant in the property conveyed in this patent the easements on the surface property necessary for discovering and working mines therein."

The Commission had recommended that lands more valuable for mineral than agricultural purposes should be classified as mineral lands and subject to sale and entry only under mineral laws. Major Powell argued that since one-half of the mineral lands in the western United States were forest lands from which, under the Commission's recommendation, the timber alone was to be sold to timber claimants, thus leaving such lands open to mineral exploration, and since the other half of the mineral lands were largely pasturage lands, that this severance recommended by him would quite thoroughly protect the mining industry.

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mining law, but the experience of other countries which have successfully operated their mines under laws based on this principle would afford great assistance in framing such legislation.[52]

The complex problem here presented is surrounded with profound difficulties and no matter in which direction we turn, we are confronted with unknown quantities and untried conditions. Any critic who ventures to prophesy with any degree of assurance that, by abolishing the extralateral right and also the time-honored principle of discovery, the millenium in mining operations will be attained, has closed his eyes to these uncertainties and is acting on blind faith. The writer does not claim to have received any information from an inspired source and is free to confess that the more the situation is studied the graver its uncertainties become. It will take a master mind to hew the way and devise a substitute law which will work in harmony with our other land laws and which will not bring chaos in its wake.

A commission composed of the best talent available has been proposed but legislation to bring about this result failed at the last session of Congress. It is certain that if revision is desirable it should not take place piece-meal and without due consideration of its effect on other land laws.[53]

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[52] "An enlightened public sentiment concerning our mineral land policies can be formed only in the light that is afforded by knowledge of the kindred systems of the progressive peoples of the earth." United States Senator Thomas J. Walsh, Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 411.

[53] The provisions of the proposed Revision Commission Bill were explained at length in Transactions of the American Institute of Mining Engineers, Vol. XLVIII, pp. 405-411. Unquestionably, the plan there urged of general revision rather than "tinkering or patchwork revision" cannot be successfully controverted. Writing of the present laws, Edmund H. Kirby there says (p. 406): ". . . . Their various parts are so interdependent that it is practically impossible to correct individual faults without revising the laws as a whole."

There were several bills introduced in the 64th Congress having for their object the revision of the mining law. One in particular (Senate 42) provided for an outright repeal of the extralateral right without any attempt to revise other features of the law so as to minimize the hardships that would inevitably result. The opinion of the Department of the Interior was requested and Secretary Lane on Jan. 21, 1916, wrote the Chairman of the Senate Committee on Public Lands as follows: "It is certainly undesirable to attempt revision by partial and piecemeal methods. The entire mining field should be surveyed and the existing mining statutes revised only after thorough examination in all particulars. This can be best accomplished by a commission such as is contemplated. In view of the probable creation of such a commission, whose duties will include consideration of the very matters included in the present bill, Senate 42, I deem it inadvisable to make any comment upon the merits of the proposed

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The writer feels justified in asserting that the following summarized statements are amply supported by the facts presented in the course of this discussion:

1. The extralateral right principle has existed in one form or another in many of the mining laws of the world but in nearly all instances this feature has been eventually abolished because of the litigation and uncertainty which it produced.

2. The extralateral right was adopted as a part of the mining law of the West by the pioneer miners when they made their earliest quartz locations in 1850 and 1851 and it became the almost universal custom and usage of the miners throughout the mining districts to exercise "dip rights."[54]

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measure, and would suggest that the matters there involved be left to the careful study and consideration of such commission. I accordingly recommend at this time that Senate 42 be not enacted."

[54] Dr. Rossiter W. Raymond, who was intimately associated with the development of the mining law of the public domain, has contributed many learned and illuminating articles on the general subject and particularly on "The Law of the Apex" (Transactions American Institute of Mining Engineers, Vol. XII, p. 387) which descriptive phrase as well as the term "extralateral," he introduced into the literature of American mining law. He calls attention to the fact that "the term 'extralateral' could not have been applied under the Act of 1866," for the reason that the locator was entitled to a certain length of vein without regard to any width of surface ground. (Transactions of American Institute of Mining Engineers, Vol. XLVIII, p. 302). In other words, the miner's surface claim was not restricted under the Act of 1866 by lateral boundaries and hence extralateral pursuit of the vein would necessarily be a misnomer. The "dip right" as applied to this early appearance of the right to follow down indefinitely on the vein is technically a more accurate use of terms. ("The 'dip right' of the early miner was the forerunner of the modern extralateral right." Lindley on Mines, § 566). However, this differentiation of terms is more or less academic, for as a matter of fact, most of the early local rules and customs of the mining districts (See 4 California Law Review, pp. 448, 449, n., p. 47) and many of the territorial legislatures (See id., pp. 450-452) prescribed a definite lateral surface boundary limitation for lode claims and even in those districts where no such limitation was imposed, the location and occupation of all the available surface territory in the vicinity of important mines necessarily resulted in a definite lateral surface limitation for each lode claim and under such circumstances it is not a misuse of words to apply the term "extralateral" to the right that the miner exercised even in the earliest days. The same may be said of the use of the phrase "the law of the apex." Dr. Raymond points out (Transactions of American Institute of Mining and Engineering, Vol. XLVIII, p. 302; also Vol. XLIV, p. 61) that the word "apex" first appeared in the Act of 1872. As a matter of fact the apex or upper terminal edge of the vein was just as essential and its possession constituted the prime basis of the miner's right to follow the vein down on its dip in the early 50's and under the Act of 1866 as under the Act of 1872, which expressly called it by name. All of the extralateral cases decided under the Act of 1866 bear out this statement.

No attempt has been made in the course of this discussion to keep

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3. The legislatures of practically all of the western states and territories had by statute declared the extralateral right to be the mining law in force in their respective jurisdictions when Congress passed the Act of 1866 which adopted and crystallized this miner's law without material alteration.

4. The Act of Congress of 1872, which is still in force, further codified and confirmed this miner-made law, changing it only in minor respects and leaving the fundamental principle of extralateral pursuit substantially as the miners had originally adopted it.

5. The law of discovery is not only handed down to us by the pioneer miners of the West but is also a heritage of centuries of mining experience throughout the world.

6. To abolish the extralateral right will result in forcing the abolition of the principle of discovery as applied to lode mines as well, and these are two of the most vital features of our mining law.

7. With the extralateral right repealed, the only important feature of our law which has the effect of severing the underlying mineral from the surface will have been eliminated and with the principle of discovery eradicated, the simple and practical test, now thoroughly understood, will no longer be available to the prospector and locator, and unless some substitute is furnished he will find himself at the mercy of the agricultural claimant or the unscrupulous speculator.

8. The alternative suggested of leaving classification of lands to government agents will shift the initiative in determining mineral character from the individual locator, as it exists at present, and will be a long step in the direction of complete government control of metalliferous mining.

9. The logical solution based on world experience is to sever all mineral except superficial deposits from the surface and dispose of the minerals and the surface separately.

10. Whether a workable system based on this principle of severance can be devised at this late day which will not result

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this refinement of terms in mind for it would serve no practical purpose and would merely result in confusion. The expressions "extralateral right," "law of apex," and "dip right" have been used to convey the same general idea of a right to follow a certain length of vein on its dip into the earth indefinitely.

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in producing greater confusion and more litigation by reason of new and untried problems and conflict with innumerable rights vested under the former system, is a question which would tax the wisdom of Solomon.

11. In any event, revision, if attempted, must be general and not piecemeal and should be enacted only as the result of the most careful deliberation by a commission composed of the best talent available.[55]

Wm. E. Colby.

Berkeley, California.

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[55] On April 4, 1917, Senator Smoot introduced in the United States Senate (S. 104) a bill "To provide for a commission to codify and suggest amendments to the general mining laws," with power "to hold public hearings in the principal mining centers in the Western United States and Alaska," etc., and to "consider the laws and experience of other countries with respect to disposition and development of mines and minerals" and "within one year" to submit to the President a report and "a tentative code of mineral laws."

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BAR ASSOCIATION NOTES.

THE following officers were elected at the meeting of the Los Angeles Bar Association on February 27, 1917, to serve for one year: President, Oscar C. Mueller; Senior Vice-President, J. W. McKinley; Junior Vice-President, Edgar W. Camp; Secretary, R. H. F. Variel, Jr.; Treasurer, T. W. Robinson. The office of the Secretary is 687-691 I. W. Hellman Building, Los Angeles.

The San Francisco Bar Association on March 15, 1917, tendered a banquet to its retiring President, Jesse W. Lilienthal, which was largely attended by members of the bench and bar. President

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Jeremiah F. Sullivan has appointed a committee for the purpose of devising plans for the development of a stronger spirit of fraternity at the bar.

At the annual meeting of the Oakland Bar Association, held on April 7, 1917, the name of the organization was changed to Alameda County Bar Association. The following were elected officers for the ensuing year: President, M. C. Chapman; Vice-president, Earl Warren; Secretary, Earl W. White; Treasurer, A. J. Woolsey.

ANNUAL CONFERENCE OF CHARITIES AND CORRECTIONS.

THE forty-fourth Annual Conference of Charities and Corrections will be held at Pittsburg, Pa., June 6-13, 1917. Such matters as social insurance, juvenile courts, illegitimacy, regulation of charities, the treatment of crime and criminals, domestic courts, all of which are included in the program, are of living interest in the modern development of the law. The address of the General Secretary of the Conference, William T. Cross, is City Club Building, Chicago, Ill.

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Comment on Recent Cases

ADVERSE POSSESSION: PAYMENT OF TAXES: DOUBLE PAYMENT.—A person claiming title by adverse possession in California must show that he has paid all the taxes assessed during the statutory period.[1] But may the payment of taxes by the adverse possessor be subsequent to payment of the same taxes by the holder of the legal title? The California decisions on this matter are not entirely consistent.

The question first arose in 1893 in Cavanaugh v. Jackson.[2] In this case, it was held in a decision of the Supreme Court in department that the adverse possessor fulfilled all conditions of the statute[3] by having the land assessed to him and paying the taxes thereon, and that the number of times the taxes thereon were paid by others was immaterial. The court declined to follow an Illinois case taking the opposite view,[4] claiming that to do so would cause a scramble to the tax-collector's office between the adverse claimant and the legal owner. Justice Harrison, however, though concurring in the result, declared that the taxes having once been paid, the burden was removed, so that there was no longer any tax to be paid; and, as a result, no right could be acquired by the adverse possessor if he paid the taxes subsequent to payment by the holder of the legal title. Four years later in Carpenter v. Lewis[5] the question again arose in the same department and Justice Harrison's view was adopted.

The question again arose in 1907, and the District Court of Appeal after reviewing the two previous decisions of the Supreme Court followed Justice Harrison's view.[6] In 1909 this rule was once more approved by the District Court of Appeal.[7] During the same year, the question was again presented to a department of the Supreme Court in Owsley v. Matson.[8] and after discussing Cavanaugh v. Jackson [9] and Carpenter v. Lewis,[10] the court followed the former decision. Two later decisions of the District

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[1] 1 California Law Review 53.
[2] 99 Cal. 672, 34 Pac. 509.
[3] Cal. Code Civ. Proc., § 325.
[4] Bolden v. Sherman (1882), 101 Ill. 483.
[5] (1897), 119 Cal. 18, 50 Pac. 925.
[6] Commercial National Bank v. Schlitz (1907), 6 Cal. App. 174, 91 Pac. 750.
[7] Glowner v. De Alvarez (1909), 10 Cal. App. 194, 101 Pac. 432.
[8] (1909), 156 Cal. 401, 104 Pac. 983.
[9] Supra, n. 2.
[10] Supra, n. 5.

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Court of Appeal[11] followed Owsley v. Matson, and in 1916 it was approved by a bank decision of the Supreme Court in Cummings v. Laughlin[12] which, however, did not consider the point very fully.

But the District Court of Appeal in the recent decision of *Van Calbergh v. Easton*[13] held that the payment of taxes by the adverse possessor after the holder of the legal title had already paid them, did not satisfy the statute. The court attempted to reconcile its decision with Cummings v. Laughlin[14] and Owsley v. Matson[15] on the ground that those cases involved overlapping boundaries, and were for that reason subject to a different rule.

The arguments presented by the District Court of Appeal, however, apply as well to the two cases it attempts to reconcile as to the principal case itself. The lien of the tax was removed by its payment; and the moment it was paid there was no longer a legally assessed tax in existence on the property for that year. The payment by the adverse possessor to the tax-collector after the holder of the legal title had already paid, could not be a payment of taxes, as they had ceased to exist when paid. The first payment of the taxes discharged the lien, and the second was therefore a mere voluntary payment of no legal effect as regards adverse possession.

If it is not admitted that the first payment of taxes discharges the lien in cases of overlapping boundaries, it then must be held that the adverse possessor must pay both taxes, not only those assessed to him, but those assessed to the legal owner as well. The code provides that the adverse possessor must pay all taxes levied and assessed on the property,[16] and if both are considered as valid taxes, both must be paid to comply with the statute.

The argument that the view of the statute as expressed by the principal case will cause a scramble to the tax-collector's office, is, as the court pointed out, an argument against the expediency of the statute, and not a reason for a different interpretation thereof. The principal case is supported by the weight of authority in other states,[17] and it is hoped that the Supreme Court will definitely

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[11] Bell v. Germain (1910), 12 Cal. App. 375, 107 Pac. 630; People's Water Co. v. Lewis (1912), 19 Cal. App. 622, 127 Pac. 506.

[12] (Oct. 21, 1916), 52 Cal. Dec. 481, 160 Pac. 833.

[13] (Feb. 13, 1917), 24 Cal. App. Dec. 320.

[14] Supra, n. 12.

[15] Supra, n. 8.

[16] Supra, n. 3.

[17] Morrison v. Kelly (1859), 22 Ill. 609, 626; Ross v. Coat (1871), 58 Ill. 53; Bolden v. Sherman, supra, n. 4; Maher v. Brown (1899), 183 Ill. 575, 56 N. E. 181; Clayton v. Feig (1900), 188 Ill. 603, 59 N. E. 245; Rio Grande Western Ry. Co. v. Salt Lake Investment Co. (1909), 35 Utah 528, 101 Pac. 586, 591 (approving Carpenter v. Lewis, supra, n. 5); Cramer v. Walker (1913), 23 Idaho 495, 130 Pac. 1002 (approving Carpenter v. Lewis), supra, n. 5. Contra, Thomson v. Weisman (1904), 98 Tex. 170, 82 S. W. 503 (approving Cavanaugh v. Jackson, supra, n. 2).

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settle this disputed point in line with reason and authority by approving the holding of the District Court of Appeal for all cases of adverse possession, whether of overlapping boundaries or not.

S. M. A.

BANKRUPTCY: QUALIFIED JUDGMENT AGAINST BANKRUPT: LIABILITY OF SURETY ON BOND TO RELEASE ATTACHMENT ON PROPERTY OF BANKRUPT.—An adjudication and discharge in bankruptcy, when pleaded, is an effectual bar to an action against the bankrupt, provided the claim upon which the action is founded is one provable in the bankruptcy proceeding.[1] To this rule there are a few exceptions which are enumerated in the Act.[2] The discharge, however, will not alter "the liability of a person who is a co-debtor with, or grantor, or in any manner a surety for a bankrupt."[3] But what if the surety conditions his liability upon the recovery of a judgment against the principal obligor?

In *Tormey v. Miller*[4] a bond was given to release an attachment. The liability of the sureties was conditioned upon the recovery of a judgment by the plaintiff. Within four months after the attachment was so released the defendant was adjudicated a bankrupt and was thereafter given his discharge. This discharge the bankrupt set up by way of supplemental answer as a bar to the action. The District Court of Appeal held that the plaintiff was, for the purpose of enforcing the liability of the surety, entitled to a qualified judgment against the defendant with a perpetual stay of execution.

It is well established that where the attachment has been levied more than four months prior to the bankruptcy, it is not invalidated by the adjudication,[5] and a special judgment may be had against the bankrupt in order to enforce the obligation of the sureties.[6] This is obviously correct, for had the attachment been continued it would have been unaffected by bankruptcy, and

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[1] Williams v. U. S. Fidelity Co. (1915), 236 U. S. 549, 59 L. Ed. 713, 35 Sup. Ct. Rep. 289; Nelson v. Petterson (1907), 229 Ill. 240, 82 N. E. 229; Wood v. Carr (1903), 115 Ky. 303, 73 S. W. 762; Bankruptcy Act, § 17a, 30 Stats. at L. 544.

[2] Bankruptcy Act, § 17a, subds. 1-4, 30 Stats. at L. 544.

[3] Bankruptcy Act, §16a, 30 Stats. at L. 544; Aliendroth v. Van Dolsen (1888), 131 U. S. 66, 33 L. Ed. 57, 9 Sup. Ct. Rep. 619.

[4] (Sept. 19, 1916), 23 Cal. App. Dec. 429, 160 Pac. 858.

[5] Globe Bank etc. Co. v. Martin (1915), 236 U. S. 288, 59 L. Ed. 583, 35 Sup. Ct. Rep. 377; Bankruptcy Act, § 67, subd. f, 30 Stats. at L. 544.

[6] Hill v. Harding (1888), 130 U. S. 699, 32 L. Ed. 1083, 9 Sup. Ct. Rep. 725; Bank of Commerce v. Elliott (1901), 109 Wis. 648, 85 N. W. 417; U. S. Wind Engine & Pump Co. v. North Penn Iron Co. (1910), 227 Pa. St. 262, 75 Atl. 1094; Smith v. Lacey (1905), 86 Miss. 295, 38 So. 311; Rosenthal v. Nove (1900), 175 Mass. 559, 56 N. E. 884; Holladay v. Hare (1886), 69 Cal. 515, 11 Pac. 28.

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the bond having taken its place should be similarly unaffected. Where, however, the attachment is levied within four months prior to the filing of the petition in bankruptcy, the attachment is automatically rendered void by the adjudication. Should not therefore the bond which takes the place of the attachment be similarly rendered void?

Many federal and the majority of the state courts so hold, and the view is supported by strong considerations.[7] The purpose of an attachment bond is to release the attached property, which property is to be returned in the event of a judgment against the defendants. What is sought to be gained by the attachment bond is security equal in value to the lien on the attached property. If that lien through subsequent bankruptcy is voided and rendered valueless, should not the attachment bond also fall?

In California[8] a different rule obtains, as is evidenced by the principal case[9] holding it immaterial that the attachment lien was created within four months prior to the bankruptcy proceedings. This rule is based on the argument that the attachment having been dissolved before the bankruptcy proceedings were begun, there was no attachment upon which the bankruptcy proceedings could operate, and the attachment bond being supported by a good consideration, is unaffected by the adjudication of bankruptcy and is therefore binding upon the sureties.

It may be worthy of note that the court in its opinion cited section 67c of the Bankruptcy Act, instead of section 67f, and was perhaps influenced in its decision by this section.

A. I. D.

CONSTITUTIONAL LAW: ACTIONS TO DETERMINE TITLE: NOTICE.—In ordinary actions notice and an opportunity to be heard are essential to due process of law within the meaning of the constitutional provision, "nor shall any State deprive any person of property, without due process of law."[1] But there are different forms of notice, and such forms are of varying degrees of effectiveness. Notice may be actual or constructive; constructive

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[7] Collier, Bankruptcy (5th ed.), pp. 199, 200; Brandenburg, Bankruptcy, § 415; Klipstein & Co. v. Allen-Miles Co. (1905), 136 Fed. 385; Stull v. Beddeo (1907), 78 Neb. 119, 112 N. W. 315; Crook Horner Co. v. Gilpin (1910), 112 Md. 1, 75 Atl. 1049; Windisch-Mulhauser Brewing Co. v. Simms (1911), 129 La. 134, 55 So. 739.

[8] Rosenthal v. Perkins (1898), 123 Cal. 240, 55 Pac. 804; S. F. Sulphur Co. v. Aetna Indem. Co. (1909), 11 Cal. App. 695, 106 Pac. 111; cf. also McCombs v. Allen (1880), 82 N. Y. 114; King v. Will J. Block Amusement Co. (1908), 126 App. Div. 48, 111 N. Y. Supp. 102.

[9] Supra, n. 4.

[1] U. S. Const., Amend. XIV; Ballard v. Hunter (1907), 204 U. S. 241, 51 L. Ed. 461, 27 Sup. Ct. Rep. 261; Ochoa v. Hernandez y Morales (1913), 230 U. S. 139, 57 L. Ed. 1427, 33 Sup. Ct. Rep. 1033; Simon v. Craft (1901), 182 U. S. 427, 45 L. Ed. 1165, 21 Sup. Ct. Rep. 836.

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notice may arise from such matters as attachment or adverse possession of property, publication and recordation.

In actions to determine title the sufficiency of any given form of notice depends upon two considerations: on the one hand, the due process clause was not intended to hamper the state unduly in its determination of the title to property within its jurisdiction;[2] on the other hand, the fundamental principles of justice embodied in this clause require that the property owner be given as much protection as is consistent with the state's being able to determine property titles with reasonable facility. It would seem, therefore, that the most effective form of notice practicable should be employed, but in *O'Neil v. Northern Colorado Irrigation Co.*[3] the United States Supreme Court apparently takes the position that the notice which a property owner receives from the mere recording of a judgment is sufficient under the due process clause, irrespective of whether more effective forms of notice were readily available. This case arose in Colorado. It was an action to determine whether the plaintiff's water right, having a priority subsequent to January 18, 1879, was prior to a water right belonging to the defendant. The defendant claimed that a decision which he had obtained some twenty years before, in an action to which the present plaintiff was not a party, to the effect that the present defendant's water right had a priority of the date of January 18, 1879, was conclusive upon this plaintiff under a state statute providing that judicial decrees determining water rights and their priorities should be conclusive as to *all* persons unless contested within four years. In an opinion written by Mr. Justice Holmes the Supreme Court sustained the defendant's contention, without considering whether more effective means of giving notice than those taken in the former action brought by the present defendant were practicable, merely saying, "there was nothing to hinder the state from providing that if he [the present plaintiff] took no steps to assert his rights within a reasonable time after the judicial assertion of an adverse title, the decree being a public fact, he should lose his rights."

It is interesting to note that in an earlier opinion, written while he was Chief Justice of the Massachusetts Supreme Court, Mr. Justice Holmes favors a similar freedom in the construction of the words "due process of law;" he there says, "a proceeding *in rem* may be instituted and carried to judgment without personal service upon claimants within the state, or notice by name to those outside of it, and not encounter any provision" of the United States Constitution; and that as regards notice "the immediate recording

[2] Cunnius v. Reading School District (1905), 198 U. S. 458, 49 L. Ed. 1125, 25 Sup. Ct. Rep. 721; Jacobs v. Roberts (1912), 223 U. S. 261, 56 L. Ed. 429, 32 Sup. Ct. Rep. 303.

[3] (Nov. 20, 1916), 242 U. S. 20, 37 Sup. Ct. Rep. 7.

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of the claim is entitled to equal effect from a constitutional point of view" with a seizure of the property.[4] But it is hard, nevertheless, to reach any other conclusion than that to allow a person to be deprived of property with no notice, other than that to be derived from the mere recording of a judgment, when there are other more effective practicable ways of giving him notice, works an injustice which the due process clause was intended to prevent.[5]

R. E. H.

DEEDS: SUFFICIENCY OF DELIVERY WHEN DELIVERED TO TAKE EFFECT UPON DEATH.—It is well settled in the United States that a deed delivered to a third person for delivery after the grantor's death is valid, if the grantor retains no control over it.[1] But this conclusion is reached by two different theories and often we find both theories advanced in the same jurisdiction, the court at one time holding that the title passes to the grantee at the moment of delivery by the grantor to the depositary, and at another time that title does not pass until the second delivery, and then by the fiction of relation back, it is deemed to have passed at the time of the first delivery.[2] Where the contest is between the grantee and the heirs of the grantor, it makes practically no difference which theory is accepted, for the only real question is whether the grantee has the title—how and when he got it is of little importance. But where creditors, or persons claiming rights derived from the grantor between the first and second delivery come in, it is important to determine under what theory the grantee acquires title.[3]

The better theory was accepted in the case of *Smith v. Smith*,[4] where the grantor wrote to his attorney: "I herewith deliver to you two deeds, one to each of my sons, N. D. Smith and G. C. Smith, and direct that you keep and hold the same in escrow during my lifetime, and upon my death deliver them to N. D. Smith and G. C. Smith so that they may then take effect." The court held that the title to the property vested immediately in the

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[4] Tyler v. Judges of the Court of Registration (1900), 175 Mass. 71, 55 N. E. 812, 51 L. R. A. 433.

[5] Bear Lake County v. Budge (1904), 9 Idaho 703, 75 Pac. 614; State v. Guilbert (1897), 56 Ohio St. 575, 47 N. E. 551, 60 Am. St. Rep. 756.

[1] If the grantor retains control over such instrument it is testamentary, because not until his death is it intended to be operative; and being in substance a will, it must fail of effect if it does not satisfy the statutory requirements of a will. Doe v. Bennett (1837), 8 Car. & P. 124, 34 Eng. C. L. 322; Hayden v. Collins (1905), 1 Cal. App. 259, 81 Pac. 1120; Tennant v. John Tennant Memorial Home (1914), 167 Cal. 570, 140 Pac. 242; Wellborn v. Weaver (1855), 17 Ga. 267, 63 Am. Dec. 235; Stinson v. Anderson (1880), 96 Ill. 373; Wilson v. Carrico (1895), 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213, and note; 1 Cornell Law Quarterly 100.

[2] 26 Harvard Law Review 579, n. 39.

[3] Wittenbrock v. Cass (1895), 110 Cal. 1, 42 Pac. 300.

[4] (Nov. 29, 1916), 52 Cal. Dec. 595, 161 Pac. 495.

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sons, subject only to a life estate in the grantor, thus following the line of California cases headed by Bury v. Young.[5] This theory carries out the intention of the grantor. By his direction to the depositary to retain the deed in his own possession until the death of the grantor, he clearly has in mind the creation of a situation such that he shall not be disturbed in the possession of the property during his life,[6] and as he can retain no control whatever over the instrument,[7] his creditors or persons claiming under him should be able to attach only his interest, and should not be able to affect the interest of the grantee.

The unsuccessful party in Bury v. Young,[8] where the theory that title passed immediately on delivery to the third person was first laid down by the Supreme Court of California, relied on the earlier case of Hibberd v. Smith,[9] where the theory was adopted that title did not pass until the second delivery, and then it related back to the first. This latter theory seems to be now discredited in California. It undoubtedly had its origin in the confusion which still exists, unfortunately, between the class of cases now under consideration and the true escrow. The distinction has been stated by Chief Justice Shaw: "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently."[10] Where a deed is delivered to a third party to be delivered after the grantor's death, it should not be called an escrow, and the principles which apply to escrows should not be applied. It is a pure fiction to hold that the grantor delivers the deed after his death.

The later California cases have not followed Hibberd v. Smith[11] in the view taken of delivery. It was there held that assent by the grantee was necessary to the delivery of a deed, whether such delivery was actual or constructive.

At common law a deed became effective without any assent on the part of the grantee, though he could refuse it if he so desired. In other words, an acceptance of the deed by the grantee,

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[5] (1893), 98 Cal. 446, 33 Pac. 338; Wittenbrock v. Cass, supra, n. 3; Moore v. Trott (1909), 156 Cal. 353, 104 Pac. 578; Husheon v. Kelley (1912), 162 Cal. 656, 124 Pac. 231; Long v. Ryan (1913), 166 Cal. 442, 137 Pac. 29; Williams v. Kidd (1915), 170 Cal. 631, 151 Pac. 1; Rice v. Cary (1915), 170 Cal. 748, 151 Pac. 135.

[6] 26 Harvard Law Review 577.

[7] Supra, n. 1.

[8] Supra, n. 5.

[9] (1884), 67 Cal. 547, 4 Pac. 473.

[10] Foster v. Mansfield (1841), 3 Metc. 412, 37 Am. Dec. 154.

[11] Supra, n. 9.

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or even knowledge on his part of its execution, was unnecessary.[12] The contrary view, requiring an acceptance, involves much difficulty when the grantee is an infant or an insane person and in such cases the courts presume an acceptance, or in other words, adopt the common-law rule.[13]

The better rule is, "When the maker of a deed delivers it to some third party for the grantee, parting with possession of it, without any condition and without reserving any control, the delivery is complete and the title passes at once, although the grantee may be ignorant of the facts, and no subsequent act of the grantor can defeat the effect of such delivery."[14] Later California cases agree that the question whether a deed has been delivered is not to be determined by mutual intent of grantor and grantee but solely by the intent of the grantor.[15]

T. G. C.

EASEMENTS: PROFITS À PRENDRE: NATURE OF RIGHT TO TAKE WATER FROM PIPES.—In the case of *Southern Pacific Company v. Spring Valley Water Company*[1] the railroad company granted to the water company by deed "the right to lay and maintain a line or lines of water pipe" in the grantor's land. The consideration stated was "the construction of a hydrant at" a certain station "and the free use of water therefrom for fire, station, and all other railroad purposes." Many years later, the water company having threatened to discontinue the supply of water, the question arose as to what was the nature of the railroad's right to the water in the pipe. Was it a profit à prendre, an easement, or a contract right? If the right was merely contractual, either party was en-

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[12] Degory v. Roe (1589), 1 Leon. 152, 74 Eng. Rep. R. 141; Butler and Baker's Case (1591), 3 Coke 25a, 76 Eng. Rep. R. 684; Thompson v. Leach (1690), 2 Vent. 198, 86 Eng. Rep. R. 391; Xenos v. Wickham (1863), L. R., 2 H. L. 296; Tiffany, Modern Law of Real Property, § 407.

[13] Parker v. Salmons (1897), 101 Ga. 160, 28 S. E. 681; Winterbottom v. Williams (1894), 152 Ill. 334, 38 N. E. 1050; Miller v. Meers (1895), 155 Ill. 284, 40 N. E. 577; Sneathen v. Sneathen (1891), 104 Mo. 201, 16 S. W. 497; Davis v. Garrett (1892), 91 Tenn. 147, 18 S. W. 113.

[14] Robbins v. Rascoe (1897), 120 N. C. 79, 26 S. E. 807.

[15] Kenniff v. Caulfield (1903), 140 Cal. 34, 73 Pac. 803; Estate of Cornelius (1907), 151 Cal. 550, 91 Pac. 329; Follmer v. Rohrer (1910), 158 Cal. 755, 112 Pac. 544. The statement is made in Bias v. Reed (1914), 169 Cal. 33, 145 Pac. 516, that "when the deed is executed and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered." No question as to meeting of minds should be raised in determining delivery, as shown in William v. Kidd, supra, n. 5, where the court points out, "the true test under which delivery is to be determined is in ascertaining whether, in parting with the possession of the conveyance, the grantor intended to divest himself of title. The solution of this question is grounded entirely on the intention of the grantor."

[1] (Aug. 22, 1916), 52 Cal. Dec. 273, 159 Pac. 865.

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titled to terminate it after a reasonable time and upon a reasonable notice, for the agreement was silent as to its duration.[2] If, on the other hand, it was a property right, whether an easement or profit à prendre, it could not be so terminated.

An answer to the principal question is complicated by, and depends to a certain extent upon, the answers which may be given to two other questions: First, is water in pipes realty or personalty? And second, did the deed convey to the water company (*a*) title to land; i. e., a "corporeal" interest because involving the technical "possession" of land (but not necessarily an hereditament); or (*b*) mere rights in another's land, not involving "possession" thereof (and hence "incorporeal," but not necessarily hereditaments), in the nature either of a profit or an easement? The above two questions, when combined, involve four situations. These situations may be briefly stated and their necessary results indicated: (1) Suppose the water company acquired by the deed a section of land, and suppose, also, the water in the pipes to be realty; then there might be a profit à prendre to take the water. The taking would be (at common law) a profit and not an easement, as the water is not flowing in a natural stream.[3] (2) Suppose next that the water company acquired title to land, but that the water be regarded as personalty. The right of the railroad company would then be to use or take personal property confined in a space owned by the water company, which right could be neither a profit nor an easement.[4] (3) Suppose, next, the water company's right in the railroad's land to be an easement, and the water in the pipe to be personal property. Obviously, as in the second situation, neither a profit nor an easement could exist. (4) Finally, suppose the water company's right to be an easement, and the water in the pipes realty. The taking of the water-realty would be a profit; for only by treating the water in the pipes as a natural stream—denying the water to be property and recognizing merely rights of user therein—could one find an easement.[5] In cases similar to the fourth situation the question has frequently been discussed whether one right in re aliena can be "supported

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[2] Echols v. New Orleans (1876), 52 Miss. 610; McCullough etc. v. Philadelphia Co. (1909), 223 Pa. 336, 72 Atl. 633; Bellevue Borough v. Ohio V. W. Co. (1914), 245 Pa. 114, 91 Atl. 236.

[3] Race v. Ward (1855), 4 El. & Bl. 702, 119 Eng. Rep. R. 259; Jones, Easements (1898), § 55; Gale, Easements (8th ed.), pp. 8-10; Leake, The Law of Uses and Profits of Land (1888), p. 139; post, n. 5.

[4] Supra, n. 3, and post, n. 5.

[5] Manning v. Wasdale (1836), 5 Ad. & E. 758, 111 Eng. Rep. R. 1353; Hill v. Lord (1861), 48 Me. 83; 2 Blackstone (Christian's ed.) 18; supra, n. 3. Of course a profit à prendre in the grantor's land was not granted; nothing appears regarding the right to or disposition of the excavated dirt, to indicate such an intent and everything, on the contrary, shows that the grantee's rights were to begin *after* the removal of the soil in question.

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by," or be "incident to," or "rest upon" another. The better view, however, seems to be that the right to use the water would not be a right "attaching to," or "incident to," or "resting upon" the easement to run the water-realty through another's land, but a right attaching to or directly affecting the water (property).[6]

The principal case seems clearly to fall into tne fourth situation above mentioned, in which the water company's right was considered an easement, and the water in the pipes realty.

As regards the nature of the right granted to the water company, it would, of course, have been entirely possible for the railroad company to have granted in fee either a strip of land or a tubular section of sub-soil.[7] But it is evident that land was not intended to be conveyed. The grant of title to land involves the grant of the exclusive *and* unrestricted use of the land granted;[8] but while the parties here obviously intended a grant of exclusive use to the space occupied by the pipes, it is equally clear that the use granted was not intended to be unrestricted. The water company, then, acquired a mere easement in the grantor's land, and so the court held.

The court also held the water in pipes to be realty. Water in natural streams or percolating through the soil, is not property, either real or personal. Where, however, such waters have been confined (by the exercise of legal rights) in reservoirs or other containers they become the subject matter of ownership. The general rule is that water thus reduced to ownership is personal property. This view is supported by Wiel, and by the majority of the cases.[9] Under the California decisions, however, water in ponds, reservoirs and pipes—in short, all water not wholly separated from the land—is realty.[10] The view taken in the principal case is therefore in accord with the California decisions.

Having determined that the water company acquired an easement in the land, and that the water in the pipes was realty, the

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[6] Beidler v. King (1904), 209 Ill. 302, 70 N. E. 763; Rugg v. Lemley (1906), 78 Ark. 65, 93 S. W. 570, 115 Am. St. Rep. 17; Berry v. Godfrey (1908), 198 Mass. 228, 84 N. E. 304; Co. Litt. 121b, n. 7; Hanbury v. Jenkins, L. R. (1901), 2 Ch. 401; Atty. Gen. v. Copeland, L. R. (1901), 2 K. B. 101, and L. R. (1902), 1 K. B. 690; 9 Columbia Law Review 74-76; Agreements to Pay for Party-Walls, 10 Michigan Law Review 187-211; The Party-Wall Easement, 9 Illinois Law Review 247-258.

[7] Laybourn v. Gridley (1892), 2 Ch. 53; Debenham v. Sawbridge (1901), 2 Ch. 98, 32 Law Quart. Rev. 70; Challis, Real Property (3d ed.), p. 54.

[8] Reilly v. Booth (1890), 44 Ch. Div. 12; Lee v. Stevenson (1858), El. Bl. & El. 512, 120 Eng. Rep. R. 600; supra, n. 7.

[9] Bear Lake Co. v. Ogden (1893), 8 Utah 494, 33 Pac. 135; Hagerman etc. Co. v. McMurray (N. M., 1911), 113 Pac. 823; Wiel, Water Rights in the Western States (3d ed.), Vol. 1, pp. 22-35; Jones, Easements, § 55; 1 California Law Review 484.

[10] Stanislaus Water Co. v. Bachman (1908), 152 Cal. 716, 93 Pac. 858; Leavitt v. Lassen Irrigation Co. (1909), 157 Cal. 82, 106 Pac. 404; Copeland v. Fairview Land etc. Co. (1913), 165 Cal. 148, 131 Pac. 119.

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conclusion, under principles of the common law, would necessarily have been that the right to take the water was a profit—and validly created if the precedents be accepted which hold that such a right in re aliena would be one directly attaching to corporeal property, and not one "supported by" the easement right.[11] The court, however, held the right to be another easement. It is true that section 801 of the Civil Code seems to do away with the distinction between profits and easements, but that section has not been given the effect which its literal import would require. Whether, however, the right granted of taking the water was a profit, as at common law, or an easement under the code provision referred to, it would, as a property right granted for a consideration, be irrevocable so long as the grantor continued to use the right of way which was the consideration for the grant. And so the court held. But it is suggested that on principle and from the analogy of similar cases, the true intention of the parties, as gained from the language of the deed and from all the surrounding circumstances, was to make a contract for the sale of personal property (realty until severed) and not to grant a right in another's land.[12]

H. A. J.

GIFTS: RELEASE OF DEBTS.—For a creditor to make a gift of a debt to his debtor may be a commendable deed, yet honest attempts to do so are by no means certain of success. In *Sullivan v. Shea*[1] the evidence showed that the creditor had clearly, emphatically, and repeatedly declared his intention to forgive the debt, and had refused tenders of payment, yet it was held enforceable by his administratrix, upon the debtor's failure to give positive proof of delivery or destruction of the note; the inference that the decedent had destroyed it, arising from failure to find it among his effects, was not sufficient proof. The decision is undoubtedly sound on authority, though the result is contrary to the plain intention of the parties.

English law has been quite liberal to the debtor, more so than American, in this regard, particularly as to testamentary release of debt.[2] As to gifts inter vivos, including those causa mortis,[3] of which fraudulent claims are readily raised after the death of

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[11] See supra, notes 3, 5, 6.

[12] Tone v. Tillamook City (1911), 58 Ore. 382, 114 Pac. 938; McCullough etc. v. Philadelphia Co. (1909), 223 Pa. 336, 72 Atl. 633. In the present note we have ignored the public-utility aspects of the case.

[1] (Dec. 18, 1916), 23 Cal. App. Dec. 974, 162 Pac. 925.

[2] 24 Jurid. Rev. 201; 26 Harvard Law Review 445. Almost any expression of intention to forgive was formerly given validity.

[3] Gifts causa mortis are subject to the same requirements for validity as other gifts inter vivos. Beebe v. Coffin (1908), 153 Cal. 174, 94 Pac. 766; Darland v. Taylor (1879), 52 Iowa 503, 3 N. W. 510, 35 Am. Rep. 285.

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the alleged donor modern law requires that the alleged donee prove the gift affirmatively by convincing evidence,[4] and that he prove not only the intent to make the gift, but the execution of that intent. A present delivery of the thing given, either actual or constructive, so far as the subject is capable of delivery, is necessary to complete any gift.[5] Where the benevolent donor of intangible property usually fails is in not making the required constructive delivery.

Yet there are numerous ways of forgiving a debt. If it is evidenced by a written instrument, actual delivery of the instrument is sufficient, whether or not it be cancelled or indorsed.[6] Any debt, written or oral, may be released by a deed, release, receipt, or similar document delivered to the debtor.[7] Some jurisdictions require release under seal in certain cases,[8] but in general it may be quite informal.

The requirement of even a constructive delivery is not always insisted on. It has been held that recordation of a release is equivalent to delivery.[9] Indorsement of part payment on a note with intent to make a gift of the sum indorsed may be sufficient, without a ceremonial delivery and redelivery of the note.[10] Similarly, the entry of a credit on a ledger should be equivalent to release of a corresponding debit if so intended, without handing over the book.[11] Intentional destruction of a note by its payee is also effectual.[12]

In certain cases the rule has been wholly abrogated. Courts have enforced promises of release on principles of estoppel.[13] Evidence that the loan was intended as an advancement to a son was allowed to defeat action on the bond given ostensibly to secure it.[14]

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[4] Supra, n. 1; Denigan v. Hibernia etc. Society (1899), 127 Cal. 137, 59 Pac. 389.

[5] Knight v. Tripp (1898), 121 Cal. 674, 54 Pac. 267. Where actual delivery possible, verbal gift with symbolical delivery not sufficient.

[6] Licey v. Licey (1848), 7 Pa. St. 251, 47 Am. Dec. 513; Hale v. Rice (1878), 124 Mass. 292.

[7] McKenzie v. Harrison (1890), 120 N. Y. 260, 24 N. E. 458, 17 Am. St. Rep. 638, 8 L. R. A. 257, and note. Cf. Upper San Joaquin Irr. C. Co. v. Roach (1889), 78 Cal. 552, 21 Pac. 304, as to form of release.

[8] Note, 21 L. R. A. 693.

[9] Newell v. Newell (1857), 34 Miss. 385, (estoppel also involved.)

[10] Green v. Langdon (1873), 28 Mich. 221; Estate of Lewis (1891), 139 Pa. St. 640. But see Morey v. Wiley (1901), 100 Ill. App. 75; note, Ann. Cas. 1915 A, 18, 20.

[11] See Maclay v. Robinson (1895), 91 Hun. 630, 36 N. Y. Supp. 30.

[12] Denunzio's Receiver v. Scholtz (1903), 117 Ky. 182, 77 S. W. 715, 4 Ann. Cas. 529.

[13] Yeomans v. Williams (1865), L. R. 1 Eq. Cas. 184. See Miller v. Western College (1898), 177 Ill. 280, 52 N. E. 432, 69 Am. St. Rep. 242, 42 L. R. A. 797; Steele v. Gatlin (1902), 115 Ga. 929, 42 S. E. 253, 59 L. R. A. 129.

[14] Flower v. Marten (1837), 2 My. & Cr. 459, 40 Eng. Rep. R. 714.

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Another method of making a gift without delivery is for the donor to declare himself trustee for the donee.[15] Whether a creditor may successfully declare himself trustee of a debt for the debtor as beneficiary does not seem to be decided. Apparently no one has deliberately attempted the feat and it is well settled that an incomplete gift will not be construed as a valid trust, where there was no actual intention to create a trust.[16] A grant of the debt to a third person as trustee for the debtor is open to the same question.

It will be noticed that several of the methods of forgiveness mentioned, though perfectly valid, are difficult to prove after the creditor's death. The debtor must prove both that the act was done, and that it was intended to operate as a release. Clearly the safest course for the debtor is to have his would-be benefactor cancel and surrender the note to him, or deliver it with a receipt in full. But benefactors are sometimes averse to such procedure, either as a reflection upon their good faith, or with a vague desire to keep the obligation legally alive to use in case of emergencies. Many an attempt is made to satisfy the latter desire by making the debt terminable upon the creditor's death, but these almost uniformly fail, as being incomplete gifts, and testamentary in character. A note made payable to the payee alone and not to any executor, trustee, or assignee, has been held valid for that purpose, but there are contrary decisions in very similar cases.[17]

O. C. P.

LANDLORD AND TENANT: LIABILITY OF TENANT TO PAY RENT NOTWITHSTANDING DESTRUCTION OF MATERIAL PART OF LEASED PREMISES.—Section 1932 of the Civil Code of California provides that "The hirer of a thing may terminate the hiring before the time agreed upon . . . . when the greater part of the thing hired perishes from any other cause than the want of ordinary care of the hirer." In *Egan v. Dodd*[1] the court for the first time construed this section with relation to leased buildings. The lease in that case contained a covenant by the lessee to make all repairs and to return the premises in as good order and repair as received by him, reasonable use and wear excepted. After notice by the city authorities to the tenant to repair, the wall of the building collapsed, due to an excavation on the adjoining land. The court held that the lessee

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[15] Marten v. Funk (1878), 75 N. Y. 134, 31 Am. Rep. 446.

[16] Milroy v. Lord (1862), 4 DeG. F. & J. 264, 45 Eng. Rep. R. 1185; Norway Sav. Bank v. Merriam (1895), 88 Me. 146, 33 Atl. 840.

[17] Bedford's Executor v. Chandler (1908), 81 Vt. 270, 69 Atl. 874, 130 Am. St. Rep. 1057, 17 L. R. A. (N. S.) 1239 and note.

[1] (Feb. 14, 1917), 24 Cal. App. 258. See also Meek v. Cunha (1908), 8 Cal. App. 98, 102, where § 1932 was held not to apply to lease of land and crops.

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was bound to make the repairs and to pay rent to the end of the term agreed upon. The decision was based on the grounds that, as there was an express covenant on the part of the lessee to repair, section 1932 did not apply, and that the wall was not a material part of the building.

At common law, under a general covenant to repair, a tenant was bound to repair, notwithstanding the partial or total destruction of the property by whatever cause occasioned.[2] The liability of the tenant for rent after the buildings were injured or destroyed, was equally well established. A distinction is sometimes made between a lease of premises and a lease of a building with a covenant to repair.[3] In the latter case, the tenant need not rebuild when the building is destroyed, for repair does not involve the erection of a new structure, nor does he have to pay rent, for there is a total destruction of the subject matter of the contract. Statutes have been passed in several states modifying the strict common law rules,[4] but the courts are inclined to construe these very strictly.[5] Nor is the California court any exception to this rule. By the construction given section 1932 in the principal case, the common law is in full force where there is an agreement by the lessee to repair, section 1932 being merely an extension of the protection afforded a tenant under sections 1941 and 1942 where he makes no covenant to repair.

While the decision of the principal case is on all points sustained by the great weight of authority, it seems a harsh rule that a tenant should have to renew a material part of a leased building when the loss has been caused through no fault of his. The doctrine of the civil law, substantially re-enacted in the French[6] and

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[2] Polack v. Pioche (1868), 35 Cal. 416, 95 Am. Dec. 115 and note; Lockrow v. Horgan (1874), 58 N. Y. 635; Heintze v. Erlacher (1882), N. Y. 1 City Ct. R. 465; Leavitt v. Fletcher (1865), 10 Allen 121; note, 22 L. R. A. 613; note, 38 Am. St. Rep. 476-492; Tiffany, Landlord and Tenant (1910), § 116d, p. 761, § 182 et seq., pp. 1190-93; McMillan v. Solomon (1868), 42 Ala. 356, 94 Am. Dec. 654, and note, p. 662. As to early development of subject, cf. 2 Law Mag. 290; 3 Kent's Com. 466; 24 Cyc. 1085-89.

[3] Tiffany, Landlord & Tenant (1910), p. 863. For English rule, by which no distinction is made between total and partial destruction, cf. 9 Harvard Law Review 127. But see 133 L. T. 387; note, 9 Ann. Cas. 107.

[4] Kentucky Stats. (1903), § 2997; Missouri Rev. Stats. (1889), § 2393; N. Y. Laws (1896), c. 547; N. Y. Gen. Laws, c. 46, § 197; Ohio Rev. Stats. (1887), § 4113; Va. Code, § 2455; see 24 Cyc. 1089; see also 38 Am. St. Rep. 476-92; N. J. Gen. Stats., p. 1923.

[5] Markham v. David Stevenson Brewing Co. (1900), 51 App. Div. 463, 64 N. Y. Supp. 617, affirmed (1901) in 169 N. Y. 593, 62 N. E. 1097; Lockrow v. Horgan, supra, n. 2; Seymour v. Hughes (1907), 105 N. Y. Supp. 249, 252, and cases cited; Booraem v. Morris (1906), 74 N. J. L. 95, 64 Atl. 953.

[6] French Civil Code (1908), § 1732, "Lessee liable *unless* he can prove that such damages or loss happened through no fault of his."

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German Civil Codes,[7] is that "when the thing perishes without the tenant's fault, he is not obliged to make it good, but from that time his rent ceases," or that when the use is lessened, the rent should be apportioned.[8]

J. M. P.

PRACTICE: EXEMPTION OF SUITORS AND WITNESSES TEMPORARILY IN STATE FROM SERVICE OF PROCESS.—To the lawyer who has not had occasion to investigate the question, it may come as a surprise to know that the authorities have established certain exceptions to the general rule that any person within the territorial jurisdiction of the state may be served with process. In considering the question for the first time, the United States Supreme Court in *Stewart v. Ramsay*[1] decided what had already come to be the weight of opinion in state and lower federal courts; viz, that suitors, as well as witnesses, coming from another state or jurisdiction for the primary purpose of attending court are exempt from the service of civil process while in attendance upon court, and during a reasonable time in coming and going.[2] The rule seems to be the modern counterpart of the common law privilege of exemption of parties and witnesses from arrest on civil process, eundo, morando, et redeundo,[3] the arrest having for the most part given way to the summons.

The privilege finds its basis in the very substantial right of every man to be sued at home, a right which he is not willing to risk by voluntarily entering another jurisdiction even to attend court. If his presence is desired, it must be solicited. The privilege becomes, therefore, the privilege of the court, and but incidentally that of the individual. It is the price which the court is willing to pay to get those before it who alone can furnish the best evidence, and to prevent the interruption of judicial machinery. It is extended, therefore, to plaintiffs as well as to defendants;[4] and it is also extended in the case of witnesses, to attendance before legislative commissions,[5] bankruptcy proceedings,[6] and the

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[7] German Civil Code (1907), § 537, providing that rent be apportioned according to injury suffered.

[8] Puffendorf, The Law of Nature and Nations (1729). Book V, Chap. VI, par. 2.

[1] (Dec. 4, 1916), 37 Sup. Ct. Rep. 44.

[2] Parker v. Hotchkiss (1849), Fed. Cas. 10,739; State v. District Court (1915), 51 Mont. 503, 154 Pac. 200; Person v. Grier (1876), 66 N. Y. 124, 23 Am. Rep. 35; Rix v. Sprague Machinery Co. (1914), 157 Wis. 572, 147 N. W. 1001.

[3] Central Trust Co. v. Milwaukee St. Ry. Co. (1896), 74 Fed. 442; Thompson's Case (1877), 122 Mass. 428, 23 Am. Rep. 370; Ellis v. De Garmo (1892), 17 R. I. 715, 24 Atl. 579.

[4] Hale v. Wharton (1896), 73 Fed. 739.

[5] Thorp v. Adams (1890), 58 Hun. 603, 11 N. Y. Supp. 479.

[6] Matthews v. Tufts (1882), 87 N. Y. 568, 62 How. Pr. 508.

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taking of depositions.[7] A liberal attitude has resulted in the granting of the privilege to the non-resident attorney accompanying his client.[8] Comity has resulted in state courts allowing the exemption to apply to parties and witnesses in attendance on federal courts,[9] and one state, at least, has extended it to witnesses passing through the state to attend a sister state's courts.[10]

This principle of exemption from process offered as an inducement for attendance must necessarily contemplate any case where attendance on court is voluntary, and exclude the case where presence in the jurisdiction is compelled. In those jurisdictions, therefore, where witnesses residing in another county in the same state are not subject to compulsion, they are exempt while voluntarily attending court in another county.[11] The California Court, however, early took the contrary position,[12] though such witnesses are exempt from arrest. On the other hand, a person in a criminal proceeding, dragged into the jurisdiction by extradition process, cannot avail himself of a reward intended only for voluntary appearance.[13] The apparent exception of persons extradited from foreign countries, who cannot be proceeded against except for the offence for which extradited, rests solely upon treaty provisions.[14]

The service of civil process upon a privileged person, however, is not void, and the privilege must be asserted at the first opportunity or it is waived.[15] And an act of a privileged person while in the jurisdiction, which itself gives rise to proceedings against him, is regarded as a waiver as to those proceedings.[16]

W. A. S.

PUBLIC SERVICE COMPANIES: SCOPE OF FEDERAL EMPLOYERS' LIABILITY ACT.—The relation of interstate carriers to their em-

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[7] Burroughs v. Cocke & Willis (Okla., 1916), 156 Pac. 196.

[8] Central Trust Co. v. Milwaukee St. Ry. Co. (1896), 74 Fed. 442; Read v. Neff (1913), 207 Fed. 890. Contra, Greenleaf v. People's Bank (1903), 133 N. C. 292, 45 S. E. 638.

[9] Bunce v. Humphrey (1915), 214 N. Y. 21, 108 N. E. 95; Sofge v. Lowe (1915), 131 Tenn. 626, 176 S. W. 106.

[10] Sofge v. Lowe (1915), supra, n. 9.

[11] Gregg v. Sumner (1886), 21 Ill. App. 110; Reiff v. Tressler (1912), 86 Kan. 273, 120 Pac. 360; Sebring v. Stryker (1894), 10 Misc. Rep. 289, 30 N. Y. Supp. 1053.

[12] Page v. Randall (1855), 6 Cal. 32.

[13] Netograph Mfg. Co. v. Scrugham (1910), 197 N. Y. 377, 90 N. E. 962, 27 L. R. A. (N. S.) 333. The federal courts take a contrary position wholly because of stare decisis. Feister v. Hulick (1916), 228 Fed. 821.

[14] U. S. v. Rauscher (1886), 119 U. S. 407, 30 L. Ed. 425, 7 Sup. Ct. Rep. 234; In re Reinitz (1889), 39 Fed. 204.

[15] Matthews v. Puffer (1882), 10 Fed. 606; Weston v. Citizens' National Bank (1901), 64 App. Div. 145, 71 N. Y. Supp. 827.

[16] Nichols v. Horton (1882), 14 Fed. 327; Iron Dyke Copper Min. Co. v. Iron Dyke R. Co. (1904), 132 Fed. 208.

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ployees, a subject within the field of concurrent commercial jurisdiction, was definitely appropriated to exclusive federal control with the passage of the Federal Employers' Liability Act. By this act it is declared that every common carrier by railroad while engaging in commerce between any of the several states shall be liable to any person suffering injury while he is employed by such carrier in such commerce, if the injury results in whole or in part from the negligence of the carrier or its agents. It is at once obvious that to come within the scope of the act both the carrier and the injured employee must be engaged in interstate commerce, although it is not required that a fellow servant causing the injury be so engaged.[1] Whether such an employee is engaged in interstate commerce is to be determined, not from the general nature of his employment, but from the work in which he is engaged at the particular time at which the injury occurs. In *Minneapolis and St. Louis Railroad Company v. Winters*[2] the question was presented whether one engaged in making repairs in a roundhouse or shop upon an instrumentality used in interstate commerce was at that particular time engaged in interstate commerce so as to claim the protection of the federal act.

When a carrier is engaged in both intrastate and interstate commerce, using the same instrumentalities, appliances and employees in both classes of commerce, it is difficult to draw the line of demarcation between the two classes of employment; but the principle that has been applied, so far as it can be explicitly stated, seems to be that one employed at the time of his injury in the use of, or maintaining in proper condition, any instrumentality or appliance that aids in or is connected with interstate commerce, comes within the statute, although such instrumentality or appliance may also be used in intrastate business.[3] Thus, one engaged in repairing a bridge,[4] a track,[5] a freight shed, in housing interstate freight,[6] or in erecting poles on which are strung the railroad despatch wires,[7] was held to come under the statute. So also, of those engaged in the actual operation of interstate trains,

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[1] Second Employers' Liability Cases (1911), 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169.

[2] (Feb. 15, 1917), 37 Sup. Ct. Rep. 170.

[3] Eng v. Southern Pacific Co. (1913), 210 Fed. 92.

[4] Pederson v. Del. Lack. & W. R. R. (1912), 229 U. S. 146, 57 L. Ed. 1125, 33 Sup. Ct. Rep. 648; Grand Trunk Ry. Co. v. Knapp (1916), 233 Fed. 950.

[5] Zikos v. Oregon R. & Nav. Co. (1910), 179 Fed. 893; Central R. Co. v. Colasurdo (1911), 192 Fed. 901; St. Joseph & G. I. Ry. Co. v. U. S. (1916), 232 Fed. 349.

[6] Supra, n. 3.

[7] Coal & Coke Ry. Co. v. Deal (1916), 231 Fed. 604.

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as switchmen,[8] firemen,[9] despatchers,[10], and car sealers.[11] In spite of the intimation to the contrary in the First Employers' Liability Cases,[12] it has been repeatedly held that men engaged in repair shops in repairing instrumentalities used indiscriminately in intrastate and interstate commerce, come within the purview of the act.[13]

The United States Supreme Court, however, in the principal case definitely decides that one engaged in making repairs in a roundhouse or shop upon an instrumentality used in interstate commerce is not subject to the act, for at such time the instrument is definitely withdrawn from all commerce. Running repairs are expressly distinguished, as are repairs of road, track and other permanent structures. This decision, besides having the effect of overruling, among others,[14] many state decisions, including those of California denying the applicability of the state law in such cases,[15] makes necessary a modification of the above test. In so far as employment rests upon the character of the instrumentality, the instrumentality must be appropriated or dedicated to actual service; and, being in service, the character of the instrumentality will be determined by the character of the traffic. Thus, by eliminating all employments preparatory to the commencement of commerce, the decision forces a reduction of all cases to the single principle, whether the instrumentality is in actual service in commerce—bridges, tracks and similar facilities being regarded for this purpose as in actual use.

W. A. S.

STATUTE OF LIMITATION: OPEN BOOK ACCOUNT.—When a merchant sells a bill of goods at a fixed price and charges the amount on his books, must he bring suit in two years as on a

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[8] Norfolk & Western Ry. v. Earnest (1912), 229 U. S. 114, 57 L. Ed. 1096, 33 Sup. Ct. Rep. 654; Pittsburgh etc. R. Co. v. Glinn (1915), 219 Fed. 148. The principal case still leaves doubtful the case of C. B. & Q. R. R. v. Harrington (1915), 241 U. S. 177, 60 L. Ed. 941, 36 Sup. Ct. Rep. 517.

[9] Lamphere v. Oregon R. & Nav. Co. (1912), 196 Fed. 336.

[10] Baltimore & Ohio v. I. C. C. (1910), 221 U. S. 612, 55 L. Ed. 878, 31 Sup. Ct. Rep. 621.

[11] St. Louis, S. F. & Texas R. Co. v. Seale (1912), 229 U. S. 156, 57 L. Ed. 1129, 33 Sup. Ct. Rep. 651

[12] First Employers' Liability Cases (1907), 207 U S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141; Zikos v. Oregon R. & Nav. Co., supra, n. 5. Cf. 1 California Law Review 196.

[13] Northern Pac. R. Co. v. Maerkl (1912), 198 Fed. 1; Law v. Illinois Central R. Co. (1913), 208 Fed. 869; Chicago, K. & S. R. Co. v. Kindlesparker (1916), 234 Fed. 1.

[14] Supra, n. 13. The roundhouse or shop housing the instrumentality can no longer be regarded as an instrumentality of interstate commerce, for it took its character from the instrumentality housed. Thomas v. Boston & M. R. R. (1915), 219 Fed. 180.

[15] Southern Pacific Co. v. Pillsbury (1915), 170 Cal. 782, 151 Pac. 277; and modifying San Bernardino v. State Board of Equalization (1916), 172 Cal. 76, 155 Pac. 458, in so far as it covers the question of repairs.

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simple contract not in writing,[1] or is he allowed four years as upon an open book account?[2] An open book account has been variously defined,[3] but it is generally agreed that an account is "open" only when there have been a series of uninterrupted or current dealings between the parties, which are kept unclosed with the expectation of further transactions between them,[4] or where some term of the bargain remains to be fixed, whether there is one item or several.[5]

Judged by either of these tests the result reached by the District Court of Appeal in *Merchants Collection Agency v. Levi*[6] is correct. Two items of goods had been sold to defendant on the same day at a fixed price and charged to him on the books. No payments were made or other items entered. Upon suit filed more than two years thereafter it was held that the transaction was barred by section 339 of the Code of Civil Procedure which covers simple accounts not in writing. In determining that this was not an open book account under the 1907 amendment to section 337, Code of Civil Procedure, the court announced as the test that "the debtor must have made payments which, being credited to him, would indicate his desire and intent that the account should remain open."[7] This interpretation results from the use of the words "balance due" which appeared in the old provision on mutual, open and current accounts[8] and which were carried over into the 1907 amendment which covered both mutual, open and current accounts and open book accounts.[9] But to apply this qualification to open book accounts is to restrict them in a manner unknown in other states and probably not contemplated by the legislature.

The view of merchants and the profession seems to have been that the amendment of 1907 extended the four year period of limitation to all book accounts not stated, whether of one item or many, or of fixed terms or not, and that as far as merchants' accounts were concerned section 339, Code of Civil Procedure,[10]

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[1] Cal. Code Civ. Proc., § 339, subd. 1.
[2] Cal. Code Civ. Proc., § 337, subd. 2.
[3] 1 R. C. L. 207, 25 Cyc. 1044, 6 Words & Phrases, 4984.
[4] Mercantile Trust Co. v. Doe (1914), 26 Cal. App. 246, 254, 146 Pac. 692; McCamant v. Batsell (1883), 59 Texas 363, 368; Wroten Grain & Lbr. Co. v. Mineola Box Mfg. Co. (1906), 95 S. W. (Tex.) 744; 1 Am. & Eng. Encyc. of Law 435.
[5] The Golden Rod (1907), 153 Fed. 171; Gayle's Adm'r v. Johnston (1882), 72 Ala. 254, 47 Am. Rep. 405.
[6] (Jan. 26, 1917), 24 Cal. App. Dec. 166.
[7] Supra, n. 6.
[8] Cal. Code Civ. Proc., § 344.
[9] Supra, n. 2.
[10] Before 1907 the two year period covered open book accounts along with other simple accounts not in writing. Adams v. Patterson (1868), 35 Cal. 122; Gwinn v. Hamilton (1885), 7 Pac. (Cal.) 837; Rocca v. Klein (1888), 74 Cal. 526, 16 Pac. 323.

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no longer had any application, except as to accounts stated. It is highly desirable that merchants should know definitely when they must sue on their accounts. If the legislature did intend to affect all merchants' accounts by the amendment, it would perhaps be desirable, in view of the already settled meaning of the term "open book account,"[11] to remove further doubt by a rephrasing of the section.

An analysis of the principal case in its effect upon the Statute of Limitations in the various kinds of merchants' accounts gives the following results. If there are only one or two items clearly agreed upon and no payment on account, the statute is two years; even if payments have been made, the view in other states is that this is not an open book account.[12] There is no decision in California, but the period is probably two years. Where there is a series of transactions such as to constitute an open book account generally,[13] still in California the period of limitation is two years unless payments have been made, in which case it is four years. Where there are one or two items, the terms of which are in dispute, there is an open book account in other states,[14] but in California the statute runs in two years unless there is a balance due extending the period to four years. Why should not the legislature substitute for this variety of rules a simple, uniform, four year limitation for all merchants' accounts, including accounts stated? A suggested difficulty[15] in the latter case is that this will enable a merchant to wait for almost four years, then render a statement to reduce his claim to an account stated and add four years more. But practically, a merchant would not endanger his account by waiting so long merely to add another four year period to the one already given him.

J. G.

STATUTE OF LIMITATIONS: UNDERGROUND TRESPASSES: CONSTRUCTIVE FRAUD.—The statutes of most states simply provide that actions for trespass to realty shall be commenced within a certain time after the commission of the act, while actions in cases of fraud need only be commenced within a certain time after the discovery thereof. In the statutes of but few states is there a provision that actions for underground trespasses and unlawful removal of ore shall be commenced within a certain time after the discovery of the trespass.[1] In the absence of such a statute

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[11] Supra, notes 4 and 5.
[12] Supra, notes 4 and 5.
[13] Supra, n. 4.
[14] Supra, n. 5.
[15] Auzerais v. Naglee (1887), 74 Cal. 60, 67, 15 Pac. 371. For notes on Account Stated see 2 California Law Review 50, 3 California Law Review 317.

[1] Montana, Rev. Codes (1907), § 6449; New Mexico, Comp. Laws

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it is obvious that if the statute of limitations applicable to visible trespasses is applied, in most cases an injured party will be deprived of his remedy before he could know by the exercise even of the greatest amount of care that an injury had been done him—an unfortunate result, yet one which was reached by the Washington court in *Golden Eagle Mining Company v. Imperator-Quilp Mining Company*,[2] where it was held that the statute applicable to ordinary trespasses applied even where the trespass was intentional. Directly contra to this was the holding of the California court in Lightner Mining Company v. Lane,[3] where it was held that in the case of an intentional underground trespass the concealment of the act suspended the statute, and that the statute relative to fraud was to be applied.

Undoubtedly the view taken by the California court is a common-sense one, and the justice of the ruling was, of course, noted in the Washington case. The difficulty, however, presented to the court is one which always presents itself in the case of rigid codification, with its consequent mutually exclusive classification. Because it considered the cause of action as arising out of a trespass, the unlawful entry into the land of another, the court in the principal case felt constrained to hold that the statute of limitations applicable to trespasses must control, for "the substantive cause of action was not fraud"—a view sharply contrasted with the view in the Lightner case, where it was held that "the act in its very nature constitutes the deceit which makes it a fraud," and that because of this fraud, irrespective of the character of the action, time will not commence to run until the act was or might have been discovered.

The California view finds considerable support in the authorities,[4] though the cases involving the precise point are few. It is to be noted, however, that thus far the rule in California has been applied merely to the case of an intentional trespass and an intentional concealment, where indeed, elements of fraud may be found. The graver question arises whether the same rule would be applied in the case of an inadvertent trespass where no active attempt is made at concealment. Many of the elements upon which

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(1897), §§ 2916, 2978; Nevada, Rev. Laws, (1912), § 4967; Ohio, Rev. Stats., § 4982; Utah, See Bullion Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1909), 36 Utah, 329, 103 Pac. 881.

[2] (Wash., 1916), 161 Pac. 848.

[3] (1911), 161 Cal. 689, 120 Pac. 771, Ann. Cas. 1913 C, 1093.

[4] Lewey v. Frick Coke Co. (1895), 166 Pa. 536, 31 Atl. 261, 28 L. R. A. 283, 45 Am. St. Rep. 684; Eccles. Commrs. v. N. E. Ry. Co. (1877), L. R., 4 Ch. Div. 845, overruling Hunter v. Gibbons (1856), 1 H. & N. 459, 465, 156 Eng. Rep. R. 1281; Bulli Coal Min. Co. v. Osborn, (1899) App. Cas. 351, 362. Contra, but changed by statute as noted supra, n. 1, Williams v. Pomeroy Coal Co. (1882), 37 Ohio St. 583. See also (though not a case of underground trespass) Bailey v. Glover (1874), 88 U. S. 342, 22 L. Ed. 636.

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fraud could be built are here lacking. Though a contrary view prevailed for a time,[5] it now seems that in England in the case of such an inadvertent trespass time commences to run from the date of the commission of the act.[6] However, it is apparent that every consideration which induces the application of the rule in the case of an intentional trespass applies to the case of an innocent and inadvertent trespass. No fiction can be indulged in that the owner is constructively in possession of, and therefore held to know what is occurring within his land. It cannot be presumed that the legislature intended to enact a statute which would cut off the injured party's remedy without giving him an opportunity for the redress of the wrong admittedly done. If, indeed, the intentional underground trespass and the intentional concealment thereof be considered an actual fraud, why not term the inadvertent trespass, which also is of such a character as to "conceal itself," a constructive fraud?

M. W.

WILLS: SIGNATURE OF OLOGRAPHIC WILL.—Section 1277 of the California Civil Code demands that an olographic will should be entirely written, dated and *signed* by the hand of the testator himself. The name of the testator need not be subscribed to the testament; if it appears in any part of the will, it may be sufficient to constitute a signature within the terms of this section if upon the face of the instrument it is clear that the name was intended as a signature. As established by *Estate of Manchester*[1] and *Estate of McMahon*,[2] "the true rule . . . . is that wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself."[3] Consequently where at the beginning of the will, the testatrix writes, "This is the last will and testament of Elizabeth R. McMahon," and the will concludes with the statement, "I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament," the name appearing in the initial clause of the testament is intended as a signature and the will is valid.[4] On the other hand, where the concluding clause reads, "Whereunto I hereby set my hand this fourteenth day of January, 1914," and no signature follows, the name appearing in the first clause of the will is clearly not intended as a signature and the will is invalid.[5]

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[5] Eccles. Commrs. v. N. E. Ry. Co., supra, n. 4.
[6] Bulli Coal Min. Co. v. Osborn, supra, n. 4

[1] (Feb. 15, 1917), 53 Cal. Dec. 220, 163 Pac. 358.
[2] (Feb. 16, 1917), 53 Cal. Dec. 225.
[3] Estate of Manchester, supra, n. 1, at p. 223.
[4] Estate of McMahon, supra, n. 2.
[5] Estate of Manchester, supra, n. 1.

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The common-law courts in interpreting statutes concerning wills have distinguished between *signing* a will and *subscribing* a will. Under the English Statute of Frauds[6] demanding that "all devises and bequests" shall be "signed by the party so devising the same," it was not necessary that the signature should appear at the end of the will.[7] To set at rest the doubts which arose on this point the Statute of Wills[8] provides that the will shall "be signed at the foot or end thereof." So strict were the decisions of the courts, which adopted a literal construction of this mandatory clause, that it became necessary to amend the Statute of Wills in this respect by the Statute 15 & 16 Vict., c. 24 (1852), which provides in general that a will is not invalidated by the fact that the signature does not appear immediately after the last word of the will, or that the signature is written in the testimonium clause, although it is specified that the act shall not operate to give effect to dispositive clauses following, or beneath the signature. Section 1276 of the California Civil Code, providing that "every will other than an olographic will and a nuncupative will" must be "subscribed at the end thereof," is based upon the English statutes.

On the other hand, the French courts in construing the term *signed* under Article 970 of the Code Napoleon (of which section 1277 of the California Civil Code is almost a literal translation) arrive at practically the same conclusion with reference to the position of the signature as do the English courts under the Statute of Wills and the California Court under section 1276 of the Civil Code, which demand that the signature be subscribed "at the end" of the will. The commentators on the French law who adhere to the stricter view, hold that "the signature should be at the conclusion of the will because it is the completion and perfection of the act."[9] Again, "the signature is the means of certifying to all which precedes it. That which follows the signature is outside of the act and does not form a part of the testament."[10] "Everyone agrees that the place of the signature is indicated by the nature of things; it is the mark of accomplishment of the will of the testator; it is the final approbation which he gives to the act; it is thus necessary that all the dispositions of the testament be terminated by the signature."[11] Nevertheless, the view of the French courts, and those commentators who support it, is that it is not absolutely necessary that the name of the testator, to constitute a valid signature, must be detached from, and be written under, the body of the will; it may be valid even if it is embodied in the final clause of the testament, provided that the words

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[6] 29 Car. 2, c. 3 (1677).
[7] Lemayne v. Stanley (1681), 3 Lev. 1.
[8] 1 Vict., c. 26 (1837).
[9] Pothier (2d ed., 1861), Vol. 8, p. 229.
[10] Laurent, Principes de Droit Civil (1876), Vol. 13, p. 242.
[11] Laurent, Principes de Droit Civil (1876), Vol. 13, p. 247.

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which follow it may be disregarded as not essential to the validity of the will.[12] Such a doctrine has been quoted with approval by the Louisiana Supreme Court[13] in the construction of a code section identical with section 1276 of the California Civil Code. Consequently, in France, where the words following the name in the final clause of the will could not be disregarded because they included the date, an essential element of the testament, the name was held invalid as a signature;[14] on the other hand, where the words following the name in the testimonium clause included the date but could be disregarded because the date also appeared above in the body of the will, the name was considered a valid signature.[15]

In spite of the logic of the French commentators and the view of the French courts, it is submitted that the California Supreme Court in construing a section borrowed from the civil law is justified in adopting the common-law interpretation of the language used, for it is not to be presumed that the legislators in adopting a civil-law institution in a common-law jurisdiction intended as well to adopt the interpretation of the civil-law courts, but rather that the transplanted institution should receive its development in the light of its common-law surroundings.

L. N. H.

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[12] Merlin, Répertoire (1828), Vol. 16, Signature, § 3, Art. 7; Laurent, Principes de Droit Civil (1876), Vol. 13, pp. 247-249; Aubry & Rau, Cours de Droit Civil Francais (4th ed., 1875), Vol. 7, p. 108; Labori, Répertoire Encyclopédique du Droit Francais (1896), Vol. 12, p. 256, § 73.

[13] Succession of Armant (1891), 43 La. Ann. 310, 313, 9 So. 50, 26 Am. St. Rep. 183.

[14] Liége, 22 February 1812, Dalloz No. 2730. Cf. Laurent, Principes de Droit Civil (1876), Vol. 13, pp. 247-249.

[15] Cassation, 20 April 1813, Dalloz No. 2729. Cf. Laurent, supra, n. 14.

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Book Reviews

CASES IN QUASI CONTRACT.—Selected and edited by Edward S. Thurston. West Publishing Company, St. Paul, Minnesota. 1916. pp. 622. $4.00.

This selection of cases by Edward S. Thurston, Professor of Law in the University of Minnesota, is issued as one of the American Casebook Series. The selection includes in addition to a careful selection of American cases, many early English decisions and presents clearly the historical development of the subject.

H. H. P.

BANKRUPTCY FORMS ANNOTATED. Second Edition. By Marshall S. Hagar and Thomas Alexander. Matthew Bender & Company, 109 State street, Albany, New York. 1916. pp. liv, 622. $9.00.

The scope of this work is broader than is indicated by its title, including as it does in addition to bankruptcy forms, annotations to and illustrative cases of the General Orders in Bankruptcy. The rules of the several United States District Courts relating to bankruptcy are included, the whole presenting a practical work of value to the busy practitioner.

H. H. P.

A TREATISE ON THE AMERICAN AND ENGLISH WORKMEN'S COMPENSATION LAWS. By Arthur B. Honnold. Vernon Law Book Co., Kansas City, Mo. 1917. 2 vols. pp. x, 1905. $15.00.

One who undertakes to furnish the bar with a handbook upon a subject new and rapidly growing undergoes the danger of having his work superseded, and the investment of his time and trouble rendered comparatively valueless. Therefore, any attempt so to do is deserving of every encouragement, for he may render a great service in two ways, by collecting and arranging a mass of yet undigested authorities, and also by generalizing and commenting upon them so that reasonable and workable theories may ultimately be obtained upon an undeveloped subject, still confused with legislative crudities. Mr. Honnold has attempted only the first of these services, and has done it in a way that will be most useful. His first volume containes a clear analysis and presentation of the authorities. The second volume is a compilation of the statues of the various states and England with a synopsis of the German law, useful to those who wish to contrast or compare the laws of different jurisdictions. So far Mr. Honnold has come to the relief of the bar and student in a very satisfactory manner, but the value of his service is impaired considerably by the index, which, generaly speaking, is an alphabetical arrangement of nouns rather than principles. One having occasion to look up a question relating to an injury caused by a stroke of lightning or slipping on a banana peel will find himself referred to cases in which injuries from these

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causes have occurred, but if the injury arises from some cause as to which no case seems yet to have arisen, as for instance a landslide, the searcher will have difficulty in finding cases in point through the index. It is only fair to state that with the principles as yet chaotic any other manner of indexing than that which Mr. Honnold has chosen would be exceedingly difficult, but the general matter of the first volume is so excellent that one wishes he had tried his hand at a more lawyer-like arrangement.

Mr. Honnold cannot be blamed for not attempting to generalize and criticize more than he has done. He has presented himself as a compiler rather than as a critic, but in no subject is a critic with a logical and, if the terms may be used, a "Gray"-ian or "Wigmore"-ian mind more needed.* Mr. Honnold seems worthy to attempt this task. It is again a pity that he withheld his hand.

A. T. W.

MAGNA CARTA AND OTHER ADDRESSES. By William D. Guthrie. Columbia University Press. New York City. 1916. pp. x, 282. $1.50 net.

The merit of these addresses is considerable, as might have been expected from the high professional character and learning of their author. Those on "Constitutional Morality" and on "The Eleventh Amendment" are particularly interesting and abound in valuable suggestions. The advantage of Mr. Guthrie's point of view lies in his lawyer-like attitude, which recognizes the fundamental necessity for forms and conventions.

This point of view, however, sometimes leads the author to advocate positions merely because they are traditional. In the address on Magna Carta, for example, though apparently familiar with the results of modern investigation as set forth in such a book as "McKechnie's Magna Carta," Mr. Guthrie nevertheless justifies the utterly indefensible thesis that trial by jury is somehow guaranteed by that instrument. Such a statement as that "it is sufficient for us that the antecedents of the modern jury system in all its three forms of grand jury, criminal jury and civil jury existed at the time of Magna Carta and were preserved by it," is wholly inexcusable. The lawyer cannot strengthen his cause by resolutely shutting his eyes to facts which may be established by a reference to any respectable modern text book on English history.

O. K. M.

THE PROSECUTION OF JESUS: ITS DATE, HISTORY AND LEGALITY. By Richard Wellington Husband. Princeton University Press, Princeton, N. J. 1916. pp. 302. $1.50 net.

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* Mr. Bohlen's interesting and instructive articles from this point of view on a single phase of the subject should not be passed without notice. See 25 Harvard Law Review 401, 517.

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This is a scholarly discussion from the point of view of the historian, and not of the religious enthusiast or modern lawyer. An examination is made of the complex evidences bearing on the subject, and the author's conclusions, not very dogmatically stated, are that the preliminary proceedings before the Sanhedrin and the subsequent trial before Pilate were legal according to contemporaneous law.

Many lay writers have doubtless unconsciously felt that their religious fervor and interest justified them in expressing views upon a subject with which they were not qualified to deal through lack of historical training and knowledge. Nor is the question one which can be adequately treated by a lawyer without such qualification. The ordinary lawyer is prone to judge according to the standards of the system with which he is familiar, and a knowledge of Jewish history and law, and above all, the application of Roman Law in Roman Provinces, essential to an authoritative utterance, is quite outside his information.

The reviewer is an ordinary lawyer and is therefore capable of expressing only a lawyer's opinion on the evidence presented by the author. He cannot pass on the accuracy or thoroughness of Mr. Husband's historical researches, but he can declare that these researches have been made, particularly as to Roman Law in Roman Provinces, and that Mr. Husband has escaped the blinding effect of excessive fervor one way or the other, and is without the unconscious bias of a lawyer accustomed only to one system and without historical training. In addition the book is clear and readable, and to those whose prejudices do not compel them to take sides and who are interested in the subject, is most welcome.

A. T. W.

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Books Received

THE LAW OF EMINENT DOMAIN. By Philip Nichols. 2nd Edition. Matthew Bender & Co., Albany, N. Y. 1917. 2 Vols. pp. xxix, 1842. $15.00.

A TREATISE ON FEDERAL CRIMINAL LAW PROCEDURE. By William H. Atwell. 2nd Edition. T. H. Flood & Co., Chicago, Ill. 1916. pp. xxv, 808. $6.50.

A MAN IN COURT. By Frederic De Witt Wells. G. P. Putman's Sons, New York, N. Y. 1917. pp. xvi, 283. $1.50 net.

SOME LEGAL PHASES OF CORPORATE FINANCING, REORGANIZATION AND REGULATION. By Francis Lynde Stetson, James Byrne, D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie. The Macmillan Co., New York. 1917. pp. 389. $2.75.

UNFAIR COMPETITION. A STUDY OF CERTAIN PRACTICES. By W. H. S. Stevens. 3rd. Edition. The University of Chicago Press, Chicago, Ill. 1917. pp. xiii, 265. $1.50 net.

THE LAW OF TRADEMARKS, TRADENAMES AND UNFAIR COMPETITION. By James Love Hopkins. 3d Edition. The W. H. Anderson Co., Cincinnati, Ohio. 1917. pp. xv, 1054. $10.00.

THE LAW APPLIED TO MOTOR VEHICLES. By Charles J. Babbitt. 2nd Edition. By Arthur W. Blackmore. John Byrne & Co., Washington, D. C. 1917. pp. liv, 1262. $7.50.

STANDARDS OF AMERICAN LEGISLATION. By Ernest Freund. The University of Chicago Press, Chicago, Ill. 1917. pp. vii, 327. $1.50 net.

CASES ON LEGAL ETHICS. AMERICAN CASE BOOK SERIES. By George P. Costigan, Jr. West Publishing Co., St. Paul, Minn. 1917. pp. x, 616. $4.00.

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California Law Review

VOL. V JULY, 1917 Number 5

The Establishment of Civil Government in Porto Rico*

WHEN I was honored with an invitation to address the students of the Law Association of this great university, my first thoughts of a subject which might have more than ephemeral interest adverted to the present systems of jurisprudence, and particularly to those branches which have to do with the organization of the federal courts and practice before the federal courts. I felt that experience of many years would entitle me to speak upon that general subject and to suggest changes which, if adopted, would, I am sure, effect reforms vastly advantageous to our whole complex, judicial administrative scheme of government. But as we always have reformers in our midst and we can at almost any time gather their ideas of what is wrong and ought to be done for the future, I concluded that I would on this occasion refrain from piling my opinions upon the heap of suggestions already high, but instead would narrate a part of the accomplished history of how we of the United States implanted our institutions among a million people who, by the fortunes of war, were suddenly brought under the tutelage of the American flag. To the law student it ought not to be uninteresting, for it helps to demonstrate the catholicity of our profession and the demands upon its members.

The island was discovered by Columbus in 1493 on his second voyage to the Caribbean. Tradition has it that when Columbus returned to Spain and was asked by Ferdinand and Isabella to

*Address delivered before the Law Association, School of Jurisprudence, University of California.

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describe the newly discovered island, he crumpled his handkerchief in front of them, telling their majesties that such was the relief of the country. The description is not inapt, in that there is a range of hills running through the centre of the island from east to west, with altitudes from one thousand to three thousand feet. From the tops, can be seen on one side the Atlantic Ocean, and on the other the Caribbean Sea. The island is approximately one hundred miles in length and thirty-five in width, and contains an area of about thirty-five hundred square miles. It can be generally described as the fourth in size of the Greater Antilles and lying about sixty miles eastward from Haiti and five hundred miles south and east of Cuba.

Within a few months after the Spanish-American War of 1898, the American troops landed in Porto Rico on July 25th of that year. The resistance of the Spaniards to our forces was ineffectual: indeed, many of the native Porto Ricans went down to the shores to welcome them with open arms. The Porto Ricans believed that freedom, which had not theretofore been known by them, awaited them under the American flag. A few days after the landing, when the protocol was signed by which peace between Spain and the United States ensued, the island had been invested by our troops, and thereafter, in December 1898, under the treaty of Paris, it became forever ours by cession of Spain.

I will not dwell upon the events of the military occupancy of the island between July 1898 and May 1900. Under the American governors-general it was a benign military government. The laws were made by military orders issued by the general in command of the military forces, and enforced not by virtue of civil process, but as military mandates, obedience to which was required by force of the sword. A provisional court was established by military order. It was constituted with military officers and an American lawyer who had drifted to the island directly after we acquired it from Spain. But as the people wanted a civil government in which they could participate, Congress, in its wisdom, saw fit to establish a new civil governmental organization by act which became effective May 1, 1900. From that date military government ceased, and for the first time the people found themselves free to take up their own political affairs. This organic law has always been known as the Foraker Act, called so because Senator Foraker of Ohio was the author.

This organic act provided for appointment by the President of

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a governor and eleven councillors, six of whom should be the heads, respectively, of the several departments of the newly organized government, and five of whom should be natives of the Island of Porto Rico and who, although not charged with executive responsibility in being heads of departments, were yet to be members of the executive council. The council was clothed with the authority to legislate in conjunction with a house of delegates. In fine, the council and house of delegates had a legislative power not unlike the systems which prevailed in the territories of the mainland of our country. The essential difference was this: all councillors were appointed,. and six councillors acted also as executive heads. In studying the history of the form of government, I found that it was largely modeled upon the English colonial form that obtains in the Island of the Barbadoes. There we find an appointive executive council, or senate, if you will, with a majority of its members charged with executive duty as well as legislative, and a legislative assembly elective by popular vote which, in conjunction with the council, legislates generally with respect to the affairs of the island. In Porto Rico the lower house was designated the house of delegates. It consisted of thirty-five members elected from the election districts in the island, the first election districts having been established by an order of the executive council in its duty of providing for the election held in the island in 1900.

Among the executive heads was the secretary of the island. His duty was to keep the minutes of the executive council and look particularly after the affairs of the various municipalities of the island; to take general charge of executive records and correspondence. Reports to the governor go through his office: it is a sort of clearing house for executive action.

The treasurer was charged with the duty of particularly safeguarding the revenue systems, including the assessment and collection of taxes, the custodianship of all public funds, the imposition of excises, and generally the execution of all fiscal affairs.

The commissioner of the interior was charged with the building and management of improvements within the island, all harbor improvements, road construction, and operation of government telegraph lines. He also had charge of charitable institutions.

The commissioner of education had the direct responsibility for the educational affairs of the island. It became his duty to execute all laws having for their purpose the establishment of systems for

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education, construction of school houses and establishment of normal schools.

The attorney-general was the legal adviser of the governor and executive heads. It devolved upon him to aid in the establishment of a judicial system, to exercise supervision over the clerks of the court, and to prosecute all litigation wherein the public was interested. He also had supervision of prisons.

The auditor was the head of the system of accounts. It was solely through the auditor's office that warrants for the payment of money could pass. It was his duty to audit and approve every account against the island and to secure the written approval of the governor to every warrant which called for the payment of money from the treasury.

Upon May 1st, 1900, in the presence of a tremendous gathering of the people, including not only the most distinguished but throngs of bare-footed humble natives, the formalities of yielding military to civil power took place. From the front of the old Fortelaza or governor's palace, which had been built in 1533, looking over the palms out to the sapphire blue ocean, under a cloudless sky against which floated the flags of our country, came the message of a new day for this unfortunate people. It told them that forever the miseries of four centuries were ended and that the dawn of a happier day had come. As the venerable Chief Justice of the Supreme Court of the island administered the oath to the first civil governor and there pealed the strain of our national air, strong men of the island who had throughout their lives struggled and struggled against the scourge of bad government wept in solemn joy that they had lived to see that day. *Prospera lux oritur!*

So the first actual step in civil government was taken. In June we organized the executive council. The five native councillors appeared in formal dress, and after paying their respects to the governor, proceeded to what was called the throne room of the old palace in San Juan, and there formally organized by electing a president of the council, chief clerk, and minor officials. In asmuch as the five native councillors spoke no English, our proceedings were all translated as we moved from point to point.

When we were ready for business, among the first important situations which confronted us was the fiscal need of the government. We could not appropriate because legislative action contemplated concurrence of the house of delegates. Yet we had to

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have funds to meet governmental expenses from May 1, 1900, when the civil government was organized, until after the members of the house of delegates could be elected and organized and could make appropriations wherewith to pay public expenses. The insular treasury had but little money in it, and the natives could not understand the use of warrants, although they might be discounted at value at banking institutions. In the light of Spanish history, to them a government evidence of debt meant depreciated value and uncertainty of sale at any price. The suggestion of such a plan was, therefore, distasteful to the native councillors. But as no election of delegates could be had for months, we were sorely perplexed. Fortunately the first governor, Mr. Allen, of Massachusetts, was not a lawyer, and did not feel that restraint which goes with the lawyers' dread of usurpation or infringement of power. He was an intelligent, farseeing, practical business man, however, who could, and would, act, while most of us paused. He told me that he was not going to permit the credit of the island to be hawked about by natives holding warrants which they would be compelled to sell at ruinous discount to persons willing to give to holders but a small fraction of their real value. I suggested to him the difficulty of legalizing any action which the executive council might take; that there was but one arm of the legislative body in existence; and that under the organic act there was no power to appropriate without the consent of the assembly as a whole. The governor, with clear and courageous vision, said that there must be some way to avoid a humiliating evidence of the impotence of American power. So, calling to our aid the Spanish lawyers who had participated in past affairs, we searched the royal orders which had been issued from time to time by the Kingdom of Spain to control the Island of Porto Rico and Cuba, and among them found a decree to the effect that if the budget of one year was exhausted without royal order having been made for a new budget, the governor-general of the island could, by proclamation, make an order which would be effective to continue the expiring budget, subject to action of the king. With this to tie to, we concluded to have a budget adopted by resolution of the executive council, making it applicable for the fiscal year commencing July 1st, 1900, to be in force until otherwise provided for by legislative action. This scheme met the approbation of the council, the budget received approval by the governor, and was promulgated and made the authority for

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paying out the moneys from the treasury of the island upon the warrants issued by the auditor and countersigned by the governor. The incident illustrates how a forceful man met a situation which called for immediate action and which involved the good faith of our government toward the islanders.

We quickly found another perplexity which is worthy of mention. By the Foraker law, the council alone was charged with the duty of dividing the island into election districts and of providing for the first election of members of the house of delegates. Here we witnessed the first serious interruption of the harmony under which we had proceeded during the first two or three months of civil government. The Porto Ricans are all politicians, active, energetic, restless, bitter. They carry politics into all affairs of life, and opposing divisions do not put aside their antagonisms. Among the five natives whom President McKinley had appointed to the council, there were two who called themselves federals—really a pro-Spanish party, two who called themselves republicans and who were in earnest sympathy with the new sovereignty; and the fifth was a native planter who had been educated in Connecticut, had fought in the Civil War, and had an appreciation of the real littleness of the hatreds which prevailed among his own people. After the introduction of bills to district the island, the American members thought it would be well to refer the several bills to a committee made up exclusively of the five native councillors, directing them to report to the council a scheme of division of the island into election districts which would be wise and impartial. As the president of the executive council, I carried out our plan and named the five native members as a special committee upon elections. The committee soon found itself unable to agree upon a plan. Councillor Crosas, for the committee, reported that it was hopeless to expect unanimity of conclusion. Accordingly, after repeated further efforts, but consistent failure, Mr. Crosas, in committee, threw his vote to the side of the recommendation of the republican councilmen, and majority and minority reports came to the council. When the question came for consideration, Councillor Crosas, speaking first in Spanish and then in English, said that his people were like Kilkenny cats—that they could never agree; that each faction of politicians was seeking a political advantage; and that he believed that the report in which he had concurred was perfectly fair to both and should be adopted. In the triangle we became

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the direct arbiters, and no matter from which side we viewed the contentions, odium would ensue. We held a conference, and after going over the whole situation as it had been explained by the councilmen representing the several reports, we determined to throw our six votes in favor of the adoption of the report advised by Mr. Crosas. The news of our decision spread. At once throughout the island there arose intense political feeling. Abusive articles appeared in the papers representing the federal party; the coming of the Americans was deplored, they were held up to execration as tyrants, and the newspapers espousing the losing side advised that the two federal councillors who had been appointed by President McKinley should resign at once in order to preserve their prestige and show their disapproval of the action of the American councillors. We deplored the talk of resignation; it was so in conflict with popular government for men to retire from all participation because measures which they advocated were rejected that we earnestly hoped the counsel to resign would not prevail. We knew, however, that the pressure upon them was strong, and that the Latin political custom was deep-rooted. The council was to meet next day, when the adoption of the report would be the principal subject under consideration. Next day the question arose upon the adoption of the majority report upon a bill to establish election districts in the island for the purpose of the election of members of the house of delegates to be held in November. There was a motion to substitute the minority report. Remarks being called for, one of the natives speaking in Spanish burst into eloquent appeal for justice. I recall that he quoted Latin authors; and in his peroration exclaimed that no matter what action was about to be had, while he would bow to the superior power of men, yet he believed in the triumph of the justice of God. The council chamber was crowded, and as he sat down there was suppressed excitement. "Shall the report of the minority be adopted as a substitute for the report of the majority? The clerk will call the roll." Two votes for the adoption of the substitute; nine votes against the substitute. The report of the majority was adopted, and with low murmurings of dissatisfaction the crowd moved out and the session was adjourned until the next day. The following morning we received this cable from the Secretary of State, at Washington:

> "The President has received by cable the resignations of Senors De Diego and Communes as members of the executive

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council of Porto Rico. What course do you advise him to take?"

We concluded at once that it would be unwise to approach the resigning councillors and ask them to withdraw their cabled resignations; believing that the proper advice to the President was that he should accept them and promptly appoint their successors, we cabled him to that effect. The following morning we received this reply:

"To the President of the Executive Council.

I am directed by the President to inform you that he has this day accepted the resignations of Senors De Diego and Communes as members of the executive council."

A few days thereafter their successors were appointed, took the oath of office, and the membership of the council was again complete. But the political atmosphere was ill seeming and thick. The incident was unfortunate. It injected into the election campaign, just about beginning, bitterness that would have been avoided could we, who had to be in close contact with the people, have been relieved at that very early period in forming government of taking sides as between the natives themselves. In time asperities softened a little, and the object lesson gained was in showing that ours was to be a government of measures and not of men.

Election machinery was started. We expected a close contest at the polls between the two parties. But within a week of the election day a formal notice was served upon us by the Jefe or Chief, as he is called, of the federal party, that, feeling itself aggrieved at the conduct of the Americans in the executive council, the federal party would refrain from participation in the election. Beyond mere acknowledgment of the receipt of the letter, no comment was made by anyone connected with the government. Election day came. There was no disturbance of any kind, but no participation from one end of the island to the other by the federal party, and as a result, the so-called republican party of the island elected its entire thirty-five candidates to the legislature.

On January 1st, 1901, the legislature gathered. The members were full of hope and made much of the event of assemblying a body of natives to make laws for the people. Trial by jury was one of the most desired reforms, and if my recollection is correct,

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the first sentence of the first law ever passed by the legislature of the island contained these words: "The right of trial by jury is hereby established in Porto Rico." Reform systems of revenue were crystallized into statutes, a judicial system was provided for, a liberal school law was enacted, appropriations were made for the extension of roads, laws were passed looking to the establishment of more efficient health boards, measures of prison reform were adopted, and useless public places lessened in number or abolished altogether.

The educational department, in charge of Doctor Brumbaugh, now Governor of Pennsylvania, afforded that able man opportunity to do great work. Under the Spanish system, about twenty-two to twenty-five thousand children were at school; teaching had been most inadequate, the schoolrooms wretched, the attendance irregular, and the results deplorable. Doctor Brumbaugh adopted such modern methods as insured better attendance, more thorough methods of study, and liberalized the courses of instruction. Rapidly the number of children increased, and at the end of the first year the attendance had grown by thousands. It was wonderful to travel through the island and see the little native children happy in their schoolrooms and to hear them sing with a will the "Star Spangled Banner."

The greatest problem connected with the organization of the judicial system was to have it clearly understood that under our ideas it must be a wholly independent, co-ordinate branch of the government, absolutely removed from all suspicion of executive influence or legislative control. To the lasting honor of the people, the judges of the supreme court who were appointed by the President were of very pure character, high ideals, and great learning. The three natives (there were five judges) had been educated at the universities in Spain and France, and all were anxious that the courts fulfill their true mission. The Americans on the bench were thoroughly familiar with the Spanish language. It was very necessary that the Americans should know Spanish, inasmuch as no one of the Porto Rican judges spoke or understood a word of English. The supreme court preserved in the beginning the forms that had obtained under the Spanish dominion. The lawyers sat upon benches within the railing where the judges sat. They did not face the court but sat on either side of the bench at right angles to it. The clerk faced the court, sitting about twenty-five feet in front of the judges. The

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lawyers wore black gowns, and when the court opened its session, the marshal rang a bell in the corridor, but permitted none to enter the court room until the proceedings had actually begun. I remember how deeply interested the judges were in the history of the writ of habeas corpus.

The new codes which the legislature adopted were, in a modified way, like the codes of California and New Mexico. We found but little difficulty in their operation. The district judges often conferred with the attorney-general to gather his interpretations of procedure and forms. The jury system was an agreeable disappointment to us. We were uncertain lest sentiment, not evidence, gain too much hold. Very soon the responsibility of jury duty was undertaken with understanding of its obligations.

While these reforms were going on, the interior department was carrying on improvement of roads to permit of access to undeveloped parts of the island. Bridges were being built; harbors were being improved. Greater demand for labor resulted in a rise of wages for laborers, and better conditions gradually set in. The Insular Government owned and managed the telegraph lines.

In sanitary measures we preserved the systems that had been inaugurated under the military government. Yellow fever disappeared from the island, municipalities were under obligations to keep their streets clean, and the food inspection laws which had been adopted by the Spaniards were kept in force. Here let me say that in many respects the Spaniards were much more strict in their surveillance of food than are some of our American communities. For example, all bread had to be of a certain quality before the vendor was permitted to take it out into the streets, no meat was permitted to be sold except where the animal had been slaughtered before five o'clock on the morning that it was offered for sale. It was interesting to know that in such matters the Spaniard should have been so very strict, and yet that he would permit the streets of the cities to become filthy and disgusting.

We have all read, doubtless, of how the dead were buried. The poverty of the people was so great that many could not afford to buy coffins, and when a man died his family would rent from the municipal authorities the right to use a coffin for the funeral. The body would be put into this box and carried upon the shoulders of volunteers to the municipal cemetery. There it would be put into an open grave in which oftentimes other bodies

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had been buried. Not infrequently the dirt covering was so light that the skull and hair and bones of the corpse would protrude. After a certain period of time the municipal authorities would dig up the bones from a grave which was full because of several bodies and carry the bones over to a common heap in a corner of the cemetery. Thus the grave was ready for new interments. In many cemeteries the bones accumulated for years. This was done away with. Cemeteries were enlarged, the bone heaps were taken away, and modern methods have prevailed since. I do not speak of this as showing lack of respect for the dead. There was nothing of that kind existing. But the custom originated, doubtless, because of poverty and limited graveyard space.

A few words as to the legislature. It was but natural to expect a certain reaction against Spaniards. How could it be otherwise with a people entrusted with so much power after so many years of a mere obedience to authorities! I recall this incident. A distinguished citizen of the island and member of the legislature wished to introduce a bill to prevent the carrying and exhibition of crucifixes at funerals. I told him that under American rule, where perfect tolerance of religious belief was inseparably part of our freedom, such a thing could not be and that his proposal was incompatible with our institutions. He seemed quite surprised, and after indulging in a tirade against what he conceived to be the injustices of the priests during the Spanish domination, reluctantly abandoned his idea.

I recall another incident. After explanation of our purpose to relieve the people as much as possible from taxation of vital necessaries, such as taxes upon rice, codfish and beans, which are the principal foods, and to impose taxes upon luxuries, such as cosmetics, wines, musical instruments, works of art and the like, a native gentleman asked me our theory in these respects. I told him that the Spanish system—the *consumo* tax which levied upon every pound of beans or codfish that the humblest peon in the island bought—seemed very unjust to the poor, and that we preferred the American system. Afterwards he said that he never before had known why art never had flourished in the United States; that he now appreciated that it was because those who had artistic tastes and were able to indulge them were taxed so heavily that the artistic temperament in the people was repressed and thus America was behind other nations of the world in aestheticism.

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I might give many other instances, but time forbids. I have mentioned these simply to illustrate some of the peculiar things that arose. In the main, however, we found the legislature reasonable and ready to adopt legislation which would eliminate many injustices which had prevailed, and substitute for them more equitable and modern ones of our own country. The first legislature adopted codes of civil procedure, a bill of rights, a civil code, a penal code, a code of penal procedure, and a political code, all of which, in many respects, were taken from California and New Mexico.

Among the members of the bar of the island were many able men educated in Spain and France and highly trained in the civil law. The courts, in their decisions, did not write opinions as do our courts, but filed considerations and results; the usual form being *considerandos,* which constituted recitals of the issues; and *resultandos,* which, in effect, were conclusions of law flowing from the antecedent findings of fact. The supreme court was what was generally called a court of cassation. That was changed, and a jurisdiction was conferred upon it such as exists in the highest court in territories and states of the mainland. The prosecuting attorneys, called *fiscals,* exerted more influence under the Spanish system than they do with us. A *fiscal* used to sit on a bench by the judges and his opinion was generally of as much weight as was that of a judge. Under the reformed procedure the influence of that official was somewhat lessened, however.

A word as to franchises. By the Congressional organic act, the excutive council was made the sole power to grant franchises, all of which were required to be submitted to the President of the United States for his approval. Franchise matters became a very important part of the duty of the council. No small part of our duty with respect to them was to keep our own countrymen from seizing available opportunities. The economic policy which we adopted was to grant franchises which would result in the building up of enterprises and at the same time yield a revenue to the government upon scales so graduated that as the income of the corporations obtaining franchises should increase, so their annual payments to the government should be augmented. This plan worked exceedingly well, and I am satisfied that on principle it was the correct economic view.

But, to revert for an instant to the revenue system of the island generally, I will say that I am not satisfied that we were

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wise in taxing personal property and realty separately under *ad valorem* taxes. The difficulties of obtaining correct statements of the personal property of people became as great there as they are elsewhere, and devices were too common in endeavors to hide money, stocks, bonds, and other things which could be put away.

I believe now that I have covered the principal larger things which we had to do in laying the foundations of civil government. Throughout all we found much co-operation: on the other hand, a great deal of objection as time went by. As I look back upon it, while I know we made mistakes, I believe that most of what we did was for the ultimate happiness and welfare of the islanders. We may, however, have proceeded a little too fast. Perhaps some of the innovations would have been more acceptable if they had come a little bit more slowly. And yet, after more than sixteen years of civil government, there has been no repeal of any of the laws which were adopted by the first and second legislative assemblies. They seem to have been accepted as a charter to be amended and improved as experience has warranted, but not to be taken off the books. The misunderstanding of the people found expressions in abuse, ridicule, and not a little attempted insult; but we felt that so long as the policies we adopted were founded upon correct principles, they should be carried on if we could find enough support among the islanders to help us make them effective. At the end of the first year we had a government running smoothly, sufficiently perfect in all of its co-ordinate parts to administer to the wants of the people and to be self-supporting in its fiscal affairs without hardship upon the islanders. Not a dollar has ever been contributed to Porto Rico by Congress. Under the Insular Government life and property are protected, education has spread, exports increased, a balance of trade turned in favor of the island, internal improvements were carried on, justice was impartially administered, property values increased, and the people gradually became sensible of the fact that they were free from oppression or intentional disregard of their rights. Do not misunderstand me. Of course we made mistakes and never have the people been happy. Their hopes and aspirations have not been realized. But I take it that is not unnatural. In government men are usually looking for something that has not come and which they think would greatly help them if it might be attained. A distinguished Porto Rican once analyzed the ideas of his people in their frequent and eloquent clamor for liberty. I had been talking with him of

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the greater opportunities under the new order, of the better prices that products were realizing, of the higher wages that were being paid since the Americans had come to the island, of better health conditions, and so on. He replied that the Porto Rican had been led to believe that if the Americans gained the island his children would have a school practically at their doors and that he was disappointed at finding they have to walk two miles to a school house; that he would be able to acquire land; and would find himself generally in substantially happier mind. I told him that as education spread I felt these dreamy notions would disappear, but that I wanted particularly to fathom the political feelings of the people and to get at the spirit underlying their complaints and to understand their aspirations. "Well," said my visitor, "you know that for four hundred years we have been taught to hate the government and that with that feeling in our bosoms the expressions of dissatisfaction are but the ebullitions of inbred thought." But I pressed him further and asked what the people would have that they had not. To this he replied that as part of their definitions of liberty the Porto Rican had always believed that when you gave power to one man, it gave him the right to put the heel of his boot on the neck of his enemy, and that his people could not understand how a majority could rule with respect to the minority's rights without, so to speak, putting their heels on the necks of the minority. I explained that such a feeling could only be mollified by daily object lessons of self-control by those in authority, and the encouragement of that sense of mutual self-respect which must prevail in the government of a free people where every citizen is a part of the government itself. And I am convinced that tolerance has found an abiding place among the islanders and that they are vastly more moderate in their views of political duty. Almost immediately after civil government obtained, a strong demand grew up for full citizenship in the body politic of America. As islanders, they are regarded as citizens of the United States with respect to passport rights, but they are not, however, citizens of the United States within our own country, but remain citizens of Porto Rico until Congress may otherwise enact. This has irritated them, and in my judgment citizenship should be conferred.

It would be interesting to trace in detail and to summarize the progress and the results of the last sixteen years. Time forbids. My purpose was merely to give an outline of how we con-

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structed a government and established, as it were, a going governmental concern, and to tell briefly how this experiment in colonial government, if you please to call it an experiment, was undertaken. A number of us who enjoyed the confidence of President McKinley were lawyers, and I trust my story serves to illustrate how comprehensive is the law as a profession, and how the lawyer must be prepared to take up exigent calls for any public service.

To you, the members of this Association, who expect to turn to the profession of the law, let me say a word. No man should undertake the law as a profession unless his heart and mind are bent upon it and unless he realizes that if he would attain success, years of patient work are ahead of him. I say advisedly, years of patient study, because the learning and the knowledge that the truly able lawyer possesses are only to be had by unceasing devotion to work. There is no graver error than the belief that the law is an easy way to reputation or material advancement. Speaking from an experience of over thirty years in the profession, during which I have had the advantage of hearing a great many of the ablest lawyers in the country, I can say that I have never known a lawyer of high abilities and admirable professional learning who was not an untiring student. Whether on the frontier, in the rough mining camps assisting in framing codes of rules for miners' meetings, and the sparsely settled prairie sections of the West, or the great commercial cities of the Atlantic or Pacific States; whether before the courts of last resort, or only in the presence of a justice of the peace, or whether in the councils of governmental authority, a lawyer who would successfully protect the rights of persons and property can only gain proficiency by study, reflection and preparation. At this day no mere force of genius, however extraordinary, no combination of natural faculties, however rare and exquisite, no general information, however vast and extensive, when unaccompanied with exertion can constitute a truly successful professional or other public career.

Not long before Lloyd Bowers the late Solicitor General of the United States, died, he, a man of profound ability himself, was speaking to me of the tendency in young men to be satisfied with mediocrity in professional attainments, and of the duty which devolves upon the universities of the country to warn their students against the dangers of such inclinations. Mr. Bowers told me that at the first opportunity that should come to him to

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speak to a graduating class, he intended to dwell upon the idea that it was essential for a young man to concentrate upon any subject to which he meant to devote his principal thought, and that it was especially necessary that a student of the law should put forth his whole energy, giving the best there was in him, to his work, and thus to measure the standard of success by the utmost of his capabilities. There is abundant food for thought in these sentiments of Mr. Bowers. Death took him before he could develop them, and I give them to you, pausing to remind you of the highest benefits which may accrue from the study of the law.

In the performance of the work in Porto Rico, we would have been untrue to the great ideas of the profession if we had ever lost thought that in everything we did we must be just to the islanders. We were there as the humble instruments for the administration of justice, the great end of human society—Justice which,

> "O'er thrones and globes elate,
> Sits empress, crowning good, repressing ill."

Rufus Choate once said: "In all political systems and in all times, the profession of the law has seemed to possess a two-fold nature—to be fired by the spirit of liberty, and yet to hold fast the sentiments of order and reverence and the duty of subordination. It has recognized and vindicated the rights of men, and yet has reckoned it always among the most precious of those rights to be shielded and led by the divine hand and the immortal reason of law."

And should it be that any one of you is to be called to the task of helping a people to an understanding of liberty I trust that you may find something of profit in the story of Porto Rico, that beautiful island some day to be a star rising in the Caribbean.

William H. Hunt.

United States Circuit Court of Appeals,
San Francisco, California.

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The Execution of Wills in California

A JUDGE of a probate court, occasionally inclined to witticism, in commenting upon the frequency of attacks upon documents offered for probate as last wills of decedents, recently suggested that the adage "where there's a will there's a way" should now be changed to "where there's a will, there's a contest."

The official reports of the appellate courts in the state of California do not, by far, reflect the number of will contests which are entered. Most of them never reach the higher courts. These contests are, of course, predicated upon all or some of the grounds of contest recognized in this state[1] and include: (a) The competency of the decedent to make a last will and testament; (b) The freedom of the deceased at the time of the execution of the will from duress, menace, fraud or undue influence; (c) The due execution and attestation of the will by the decedent or subscribing witnesses; or (d) Any other question substantially affecting the validity of the will.

It will not be our purpose, at this time, to present anything beyond the law of the state of California (as nearly as it may be ascertained from the statutes and decisions of the courts) upon what may be regarded the "due execution and attestation of the will by the decedent or subscribing witnesses."

Invariably laymen and, very frequently, members of the bar overlook the principle, now well established, that the right to make a testamentary disposition of property is not an inherent right nor a right of citizenship. It is not a right granted by either the federal or state constitutions. It rests wholly upon the legislative will and is derived entirely from the statutes. In conferring that right, the legislature has seen fit to prescribe certain exactions and requirements, looking to the execution and authentication of the instrument, and a compliance with these requirements becomes necessary to its exercise.[2]

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[1] Cal. Code Civ. Proc., § 1312.

[2] Estate of Rand (1882), 61 Cal. 468; Estate of McCabe (1886), 68 Cal. 519, 9 Pac. 554; Estate of Comassi (1895), 107 Cal. 1, 40 Pac. 15; Estate of Walker (1895), 110 Cal. 387, 42 Pac. 815; Estate of Patterson (1909), 155 Cal. 626, p. 635, 102 Pac. 941; Estate of Price (1910), 14 Cal. App. 462, 112 Pac. 482; Estate of Carpenter (1916), 172 Cal. 268, 156 Pac. 464; Cal. Code Civ. Proc., § 1969; Cal. Civ. Code, § 1276.

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It was suggested in an earlier case[3] that, while the legislature has power to prescribe the formalities to be observed in the execution of wills, by so doing, it does not interfere with the right "from whatever source it may come" of disposing of property by will. It merely regulates the right and conserves it by reasonable formality.

From the legal maxim that "ignorance of the law is no excuse," follows the legal fiction that "everybody is presumed to know the law." The familiarization of those who are called upon to draft, execute or attest wills either for themselves or for others, with the statutory requirements thereupon, will be a long step toward the avoidance of successful attacks against wills upon the ground of lack of due execution, attestation or subscription by witnesses.

I.

Every person of sound mind and over the age of eighteen years may dispose of his property by last will.[4] Every estate and interest in real or personal property may be disposed of by will,[5] with certain exceptions. Upon the death of the wife, the entire community property, without administration, belongs to the surviving husband, except such portion thereof as may have been set apart to her, by judicial decree, for her support and maintenance, which portion is subject to her testamentary disposition.[6] Upon the death of the husband, one-half of the community property goes to the surviving wife and only the other half is subject to the testamentary disposition of the husband.[7]

A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that corporations formed for scientific, literary, or solely educational or hospital purposes, cannot take under a will unless expressly authorized by statute.[8] There is a further limitation in this regard to the effect that no property may be the subject of testamentary disposition to a charitable or benevolent society, or corporation, or to any person or persons in trust for charitable uses, unless the will is executed at least thirty days before the decease of the testator and unless, further, such total disposition does not exceed one-third of the estate of the testator leaving legal heirs.[9]

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[3] Estate of McCabe, supra, n. 2.
[4] Cal. Civ. Code, § 1270.
[5] Id., § 1274.
[6] Id., § 1401.
[7] Id., § 1402.
[8] Id., § 1275.
[9] Id., § 1313.

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If, after having made a will, a testator marries and has issue of such marriage, born either in his lifetime or after his death and the wife or issue survives him, the will is revoked, unless provision has been made for the wife by marriage contract, and for the issue by some settlement, or unless the wife and issue are provided for in the will or in such way mentioned therein as to show an intention not to make such provision.[10] The marriage of a woman, subsequent to the execution of a will by her, operates as an absolute revocation and the will is not revived by the death of her husband.[11]

It is well to bear in mind that, when any testator omits to provide in his will for any of his children or for the issue of any deceased child, unless it appears that such omission was intentional, such child or the issue of such child is entitled to the same share in the estate of the testator as if he had died intestate.[12] The same rule applies with reference to a child born after the making of the will, either in the lifetime of the testator or after his death, who is unprovided for by any settlement and not mentioned in the will.[13]

Although it is somewhat out of order to dwell upon the revocation of wills before there is a discussion of the execution of wills, yet, since we have already commented upon certain events which may operate to revoke a will, in whole or in part, we feel that it is proper to dispose briefly of this subject, bearing in mind that the primary purpose of this article is to discuss the due execution and attestation of wills by decedents or subscribing witnesses.

The revocation or alteration of a written will may be accomplished either (1) By a written will, or other writing of the testator, declaring such revocation or alteration and executed with the same formalities (hereafter to be described) with which a will should be executed by such testator; or (2) By being burnt, torn, cancelled, obliterated or destroyed with the intent and for the purpose of revoking the will by the testator himself, or by some person in his presence and by his direction.[14]

It is well to bear in mind that, when a will is cancelled or destroyed by any person other than the testator, the direction of the

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[10] Id., §§ 1298, 1299.
[11] Id., § 1300.
[12] Id., § 1307.
[13] Id., § 1306.
[14] Id., § 1292.

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testator and the fact of such injury or destruction must be proved by two witnesses.[15]

A subsequent will does not revoke a prior will, unless the subsequent will contains an express revocation, or provisions wholly inconsistent with the terms of the prior will.[16] If, after making a will, the testator duly makes and executes a second will, revoking the first will, the destruction, cancellation or revocation of such second will does not revive the first will, unless it appears by the terms of the revocation of the second will that it was the intention of the testator to revive and give effect to the first will, and unless after such destruction, cancellation or revocation the first will is duly republished.[17]

The three kinds of wills which may be made are: 1st, the nuncupative; 2nd, the olographic; and 3rd, the attested. The olographic and attested will must be in writing, executed with certain formalities.[18] A nuncupative will need not be in writing nor is it necessary that it be declared or attested with any formalities.[19]

II.

The nuncupative will is very rare. There is in fact no record, in the official reports of this state, of a nuncupative will ever having been offered for probate. This infrequency, together with the fact that recently many of our citizens, members of the National Guard, have been engaged "in actual military service in the field," and together with the additional fact that the United States of America have been drawn into the military maelstrom and have become a party to the world conflict now raging, makes it advisable to bear in mind under what circumstances a nuncupative will is valid.

To make a nuncupative will valid and to entitle it to be admitted to probate, the following requisites must be observed: (1) The estate must not exceed in value the sum of $1000. (2) It must be proved by two witnesses who were present at the making thereof, one of whom was asked by the testator at the time to bear witness that such was his will or to that effect. (3) The decedent must, at the time, have been in actual military service, in the field, or doing duty on ship board at sea and, in either case,

[15] Id., § 1293.
[16] Id., § 1296.
[17] Id., § 1297.
[18] Cal. Code Civ., Proc., § 1969; Cal. Civ. Code, §§ 1276, 1277.
[19] Cal. Civ. Code, § 1288.

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in actual contemplation, fear or peril of death, or decedent must have been, at the time, in expectation of immediate death from an injury received the same day.[20]

In order to entitle a nuncupative will to be probated, the testamentary words or the substance thereof must be reduced to writing within thirty days after they are spoken and it must be offered for probate within six months after they are spoken.[21]

Although there are a large number of adjudicated cases with reference to nuncupative wills from other jurisdictions,[22] we will not pause to comment upon them, passing, rather, to the more important discussion of the execution of olographic and attested wills.

III.

An olographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form and may be made in or out of this state and need not be witnessed.[23] A paper, to constitute an olographic will, must therefore be entirely written, entirely dated and entirely signed by the hand of the testator himself. If it be partly written by him, or partly written by another or printed, if it be partly dated or signed by him and partly by another, it is not a compliance with the statute.[24]. The legislature has seen fit to require three things to concur for the execution of an olographic will and the courts are not at liberty to hold that the legislature intended any one of these requirements to be of greater or less importance than the other. If one may be omitted, why not either of the other?[25]

An olographic will must be entirely written by the hand of the testator. It may be informally drawn. No particular words are necessary to show a testamentary intent. It must appear only that the maker thereof intended by it to dispose of property after his death.[26]

Proper punctuation, spelling and precise phraseology are not essential. Courts, in reading wills, always supply obviously

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[20] Id., § 1289.
[21] Id., § 1290.
[22] (See Kerr's Cyc. Civil Code, § 1290.)
[23] Cal. Civ. Code, 1277.
[24] Estate of Billings (1884), 64 Cal. 427, 1 Pac. 701.
[25] Estate of Martin (1881), 58 Cal. 530.
[26] Mitchell v. Donohue (1893), 100 Cal. 202, 34 Pac. 614; Estate of Silva (1915), 169 Cal. 116, 145 Pac. 1015; Estate of Scott (1900), 128 Cal. 57, 60 Pac. 527; Cal. Civ. Code, § 1328.

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omitted words, wherever the word omitted is apparent and no other word will supply the defect.[27]

A deceased left the following document as his will:[28]

"Crolldepdro, february 3, 1892.
this is to serify that ie levet to mey wife Real and persnal and she to dispose for them as she wis.
Patrick Donohue"

The court construed the document to read as follows:

"Corral de Piedra, February 3, 1892.
This is to certify that I leave to my wife (my) real and personal (property) and she can dispose of them as she wishes.
Patrick Donohue."

As thus construed, the court held that a testamentary intent was shown and, having been wholly written, dated and signed by the hand of the testator, it was admitted to probate.

An olographic will may be in the form of a letter or several letters or a series of letters.[29]

In the Estate of Cook,[30] the deceased had suffered for about twenty years from a malignant disease and had reached the condition of physical disability, where the only hope for relief held out to her was through an operation which she had consented to undergo. On the day prior to her departure for the hospital for that purpose, she wrote three letters, one to a brother, another to her sister and brother jointly, and a third to a friend who was her business agent. She stated in these letters her intention of going to the hospital and that, while everything might turn out in her favor, she nevertheless felt that her condition was more serious than the doctor thought and that she had reason to believe that she might not live through it. She then proceeded to make a declaration of what she wished done respecting her funeral. She specified the cemetery and the lot in which she wished to be buried, the kind of headstone she wanted, the inscription to be placed upon it, and the name of the minister she wished to perform her funeral service. She then proceeded

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[27] Estate of Wood (1868), 36 Cal. 75; Mitchell v. Donohue, supra, n. 26; Estate of Stratton (1896), 112 Cal. 513, 44 Pac. 1028; Estate of Goetz (1910), 13 Cal. App. 292, 109 Pac. 492; Estate of Silva, supra, n. 26.

[28] Mitchell v. Donohue, supra, n. 26.

[29] Clark v. Ransom (1875), 50 Cal. 595, Estate of Richardson (1892), 94 Cal. 63, 29 Pac. 484; Estate of Murphy (1894), 104 Cal. 554, 38 Pac. 543; Estate of Meade (1897), 118 Cal. 428, 50 Pac. 541; Estate of Cook (1916), 173 Cal. 465, 160 Pac. 553; Estate of Anthony (1913), 21 Cal. App. 157, 131 Pac. 96.

[30] Supra, n. 29.

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to make a disposition of her property. It was held, from all the circumstances under which the deceased wrote these letters and the language used, that they were obviously written *animo testandi* and were entitled to probate as a last will.

A document in the form of a letter[31] was addressed to an undertaker and was dated sixteen months prior to the death of the writer. The main object of the letter was to provide for the disposition of the body of the writer in case of death, and the letter concluded with a statement that the estate of the writer must pay all expenses and further directed that a brother take charge of the estate as the sole administrator without bonds. The court concluded that the instrument was not of a testamentary character because the intention of the deceased that the paper should stand for a last will and testament was not clearly apparent. The main question in the mind of the deceased was the disposition of her body, not of her estate, and she simply communicated with the undertaker upon this point. Such being the principal purpose of the writing, the court suggested that it should have been made plain by apt words that, incidentally, she also intended the instrument to be her will.

In another case,[32] the deceased wrote a letter to his sister expressing a desire for full information about his mother and about his sister's children, stating that he was pecuniarily independent, that his health was probably ruined, that he wanted to anticipate possibilities and containing the following language:

> "You and your children get everything; your boy I want given the best of educations."

Here again, the court held that there was nothing in the circumstances and surroundings of the writer which unmistakably evinced an intention that the letter operate as a testamentary disposition of his estate.

In Clarke v. Ransom[33] there was offered for probate the following instrument:

> "Mayfield Grange,
> Tuesday, June 23, 1874.
> Dear Old Nance: I wish to give you my watch, two shawls, and also five thousand dollars.
> Your old friend
> E. A. Gordon."

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[31] Estate of Meade, supra, n. 29.
[32] Estate of Richardson, supra, n. 29.
[33] Supra, n. 29.

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It was wholly in the handwriting of the deceased and was executed under the following circumstances. It appeared that for several years, the deceased and a Miss Ransom had been on terms of intimacy; that Miss Ransom was the person designated as "Dear Old Nance"; that the deceased was a widow, with a large estate and without children living; that she had executed a will in due form by which she had devised to her brother the whole of the estate, with the exception of several specific legacies, one of which was to Miss Ransom for one thousand dollars. After the will had been duly made and executed, the deceased desired to make a further provision for Miss Ransom and for that purpose she drew up, wholly in her own handwriting, the paper propounded as a will, and delivered it to Miss Ransom. From all these circumstances, the court found that the deceased intended that the instrument in question should take effect after her death.

In an early case,[84] a document wholly in the handwriting of the deceased and properly dated and signed was admitted to probate. Under the third clause of the will, a bequest was made to the executor of certain personal property, requesting him "to dispose of the same in the manner specified in my letter to him of this date." After the execution of this will, the deceased dictated a letter to her executor. The letter was in the handwriting of the executor but was signed by the testatrix. The will was admitted to probate as an olographic will, but the letter was properly excluded. The rule announced was that any testamentary paper may be referred to and made a part of a will, if the reference be certain, unambiguous and definite, and if the paper be in existence at the time of the execution of the will.[85]

A letter forming one of a series of about thirty, written from time to time to the brother of the writer, informing him of the purchase of certain properties and stating that, "Both propertys goes to you and Charlie if I should pass in before yous do", was held not to be testamentary in character, where the surrounding circumstances showed that the writer understood the nature and requirements of a will, but did not make it plainly apparent that this particular letter was intended by him to be his will.[86]

[84] Estate of Shillaber (1887), 74 Cal. 144, 15 Pac. 453.

[85] Estate of Soher (1889), 78 Cal. 477, 21 Pac. 8; Estate of Young (1899), 123 Cal. 337, 55 Pac. 1011; Estate of Plumel (1907), 151 Cal. 77, 90 Pac. 192.

[86] Estate of Branick (1916), 172 Cal. 482, 157 Pac. 238; see also Estate of Anderson (1916), 173 Cal. 235.

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A letter duly dated and in the handwriting of deceased, consisting of two pages addressed to the person named as executor in an olographic will, to which the letter was attached, was enclosed with the will in an envelope upon which was endorsed the name of the decedent in his own handwriting. The letter was not signed. The letter contained nothing of a testamentary character except the expression of the opinion of the deceased as to the amount which the executor should receive for his services. The letter declared that the writer had "made a will." The court held that the *animus testandi* was lacking and denied probate to the letter.[37]

In the Estate of Skerrett,[38] there was offered for probate a letter signed by the deceased and addressed to his sister. Accompanying the letter was a copy of a deed of gift from the deceased to his sister, conveying certain real property. It appeared from the face of the letter that the property described in the deed was intended by the deceased as a provision for his sister after his death. The letter was not dated, while the copy of the deed was dated. The copy of the deed and the letter were entirely written by the hand of the deceased and signed by him. The letter contained the following language:

> "We all know life is uncertain and we don't know the moment we may be called away . . . . I therefore want you to know you are provided for under any circumstances. . . . . My intention is to provide for you while I live, the same as I have always done, and hereafter, if it should please God to call me away, you will have your own property to depend on, sufficient to make you independent while you live."

The court found that the copy of the deed and the letter, as a whole, showed *animus testandi* and accordingly admitted them to probate. The court indicated that neither the copy of the deed nor the letter, by itself, constituted a will, for the one was not testamentary and the other had no date; but, taking them together as the deceased left them, one document was formed which should be regarded as a complete testamentary scheme taking effect only upon his death.

While a will (either olographic or attested) may be in the form of a deed, yet in order to entitle it to probate as a will, the instrument must not only contain words of testamentary character

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[37] Estate of Keith (1916), 173 Cal. 235.
[38] (1885), 67 Cal. 585, 8 Pac. 181.

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but must likewise satisfy the requirements of execution and must give every evidence of having been intended as a will.[39]

An instrument in the form of a deed granting and transferring, *in praesenti*, certain property to the grantee named therein but reserving its enjoyment until the death of the grantor was held to be no will.[40]

It has been said that the essential characteristic of an instrument testamentary in its nature is that it operates only upon and by reason of the death of the maker. Up to that time it is ambulatory. By its execution the maker parts with no rights and divests himself of no modicum of his estate. The death of the maker establishes, for the first time, the character of the instrument. It at once ceases to be ambulatory and acquires a fixed status and its admission to probate serves as a judicial declaration of that status.[41]

In the Estate of Skerrett,[42] the original deed of gift was offered for probate as a will. It was acknowledged as a deed but witnessed in the presence of two witnesses, who testified that the deceased had declared to them that the deed was his will and that they signed the deed in the presence of and at the request of the deceased. Containing no testamentary words and expressing no design other than a deed, the court held that it was not a will. It appeared in this case that the deed had never been delivered and, as the Supreme Court later expressed itself,[43] if a deed prove to be inoperative, as such, that fact cannot turn a deed into a will.

An instrument entirely written, dated and signed by the hand of the deceased appeared to be more than an itemized list of the property belonging to the deceased, followed by these words:

> "At my death all the above property and any other property that may be found to belong to me is to go to my wife and to her alone and I omit intentionally all other members of my family."

The court admitted this document as a will.[44]

An olographic will may be written upon more than one sheet

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[39] Adams v. Lansing (1861), 17 Cal. 629; Estate of Skerrett, supra, n. 38; Estate of Hall (1906), 149 Cal. 143, 84 Pac. 839; see also, Williams v. Kidd (1915), 170 Cal. 631, 637, 151 Pac. 1.

[40] Estate of Hall, supra, n. 39.

[41] Nichols v. Emery (1895), 109 Cal. 323, 41 Pac. 1089.

[42] Supra, n. 38.

[43] Estate of Hall, supra, n. 39.

[44] Estate of Clisby (1904), 145 Cal. 407, 78 Pac. 964.

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of paper and these separate sheets of paper, (provided they satisfy the requirements of being entirely written, dated and signed by the hand of the testator) comprising one continuous instrument or a complete testamentary scheme, will be considered as a single document and be admitted to probate as a will.[45] It is not necessary, when a will consists of several detached and separate sheets of paper, that the sheets be fastened together by mechanical or other device.[46]

The preceding decisions with reference to the form of an olographic will apply, in part, to attested wills; for, if an attested will satisfies the requirements of the law[47] as to execution, it is entitled to probate, no matter what its form, phraseology, spelling or punctuation may be, so long as an *animus testandi* is apparent.

IV.

The first prerequisite of an olographic will, testamentary language appearing as above noted, is that it be entirely written by the hand of the deceased.

In the Estate of Rand,[48] the deceased purchased a stationer's blank and filled in certain blank spaces in his own handwriting. Other portions of the instrument were in print. The will was not attested, although the attestation clause was printed as a part of the instrument but left blank. The only theory, therefore, upon which the instrument could be regarded as the will of the deceased was that it was olographic. Since portions of the instrument were printed, it was not "entirely written" by the hand of the deceased and the statute had not been satisfied. It was urged upon the court that, as these portions of the instrument which were written by the deceased could, by themselves, constitute a will, the court should admit those portions to probate, omitting the printed portions of the instrument. The court declined to adopt this view. To have done so would have effected a change in the statute and made it read that such portions of an instrument as are in the handwriting of the deceased constitute an olographic will. The instrument must stand or fall as an entirety and unless it is entirely written by the hand of the deceased the statute is not satisfied.

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[45] Estate of Taylor (1899), 126 Cal. 97, 58 Pac. 454; Estate of Merryfield (1914), 167 Cal. 729, 141 Pac. 259; Estate of Keith, supra, n. 37.
[46] Estate of Merryfield, supra, n. 45.
[47] Cal. Civ. Code, § 1276.
[48] (1882), 61 Cal. 468.

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In the Estate of Dreyfus[48a] the decedent himself wrote a testamentary document on a typewriting machine. The document was wholly in typewriting, except the signature of the decedent thereto, which signature was written by the decendent with pen and ink. It was urged that the will was made wholly by the deceased, and since the deceased had himself manipulated the typewriting machine, it could be said that the document had been made "by the hand of the testator himself." The court held that:

> "The language of sec. 1277, by the common usage of the language in 1872, or even at the present time, would mean that the entire will must be in the 'handwriting' of the testator. This would not include any sort of printing by the use of type, whether of a printing press or placed at the end of a rod manipulated by keys. . . . . The process of making letters on paper with a typewriter is essentially a process of printing. The type, fixed on a bar, is stained with ink, and then pressed against the paper, leaving its imprint, precisely as in a printing press. The word 'written' as used in sec. 1277, in the year 1872, had no such significance."

The court indicated that to extend the meaning of sec. 1277 of the Civil Code to include documents typewritten or printed by the hands of persons attempting to make testamentary documents "would greatly enlarge the opportunities for successful forgeries by taking away the means of detection which the legislature had in mind, and would defeat the purpose of the statute by destroying the safeguards which its requirements were designed to secure."

Before proceeding to the next prerequisite of olographic wills, it is perhaps advisable to dispose of one further matter with reference to testaments in general. Particular stress has been laid upon the necessity of an instrument offered as a will to show an *animus testandi*. This character in a document may be apparent even though no property is disposed of. The mere nomination of an executor, without making any disposition of one's estate or giving any other direction whatever, constitutes a will and renders it necessary that the instrument be established in the probate court.[49] The fact that a testator nominates an executor but without giving a legacy or devising any part of his property makes it, nevertheless, a will. It may often occur that, subject to the payment of his just debts, a testator is quite willing that his property shall be succeeded to as provided by law, while the selec-

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[48a] Estate of Dreyfus, Cal. Supreme Court, June 9, 1917.
[49] Estate of Hickman (1894), 101 Cal. 609, 36 Pac. 118.

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tion of the person through whom the settlement is to be made and the distribution is to be had, is not only a matter of deep interest to him, but of vital interest to the estate. As the law accords to an individual the privilege of making his selection of an executor, the courts must uphold it when the selection is properly made.

V.

An olographic will must be entirely dated by the hand of the testator. What is a date? In what does it consist? Must the date be correct? Must it be complete? May it be abbreviated? Is a date essential?

Where a paper which was presented for probate as a will was entirely written and signed by the hand of the deceased but bore no date and was not witnessed, it was held that the statute had not been complied with.[50] It was urged that the dating of a will was a mere formal matter and not absolutely necessary; but the court held that three pre-requisites to the validity of olographic wills were imposed by the legislature, and that the courts were not at liberty to hold that the legislature intended any one of the three requirements to be of greater or less importance than the other. A recital appeared in the instrument to the effect that the deceased was of the age of sixty years; but the court held that this recital did not constitute a date, for it did not appear when he was of the age of sixty years, for he might have been at that age one day before his decease or ten years prior thereto.

In the later case,[51] the instrument offered as the will of the deceased was olographic and bore a date written between the body of the will and signature in the following form: "Febr. 12, '98". It was conceded that the body of the will and the signature were in the handwriting of the deceased. The court, however, denied probate upon the ground that the date was not in the handwriting of the deceased.

The term "date" has been held to mean "day, month and year" and the omission of any one of these will be regarded as fatal to an olographic will.[52] While most of the standard dictionaries and many decisions from other jurisdictions define "date" as including "place" as well as day, month and year, it may be said to be firmly established in this state that "place" is not essential to a dating.

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[50] Estate of Martin (1881), 58 Cal. 530.
[51] Estate of Behrens (1900), 130 Cal. 416, 62 Pac. 603.
[52] Estate of Price (1910), 14 Cal. App. 462, 112 Pac. 482; Estate of Carpenter (1916), 172 Cal. 268, 156 Pac. 464.

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An olographic will may be made in or out of this state[53] and the place of its execution is therefore of no moment. A letter dated "San Francisco 27, 1911" was held invalid because of the omission of the month in the date.[54] An instrument "dated this ..... day of ..... 1906" was denied probate because the day and month were omitted.[55] An instrument dated "Winters Yo lo Co 10 1912" was denied probate on the ground that it lacked definiteness.[56] The figures "10" were followed by a space, after which the figures "1912" were written in a group, obviously intended to represent the year. While the court has held that a date may be abbreviated, (as will presently be shown), it was nevertheless held impossible to determine whether the number "10" represented, or was intended to represent, the 10th month of the calendar year or the 10th day of some other month.

An instrument dated "New York Nov. 22, 97" was wholly written and signed by the hand of the deceased.[57] The court held that it was properly dated, that it was entirely unambiguous and to every one familiar with the usage of language, it expressed the month, day and year as clearly as though they had been written out in full. Upon the same principle, a date written "4-14-07" was held proper[58] and the court said that by growing usage and custom the method of designating the month, day and year by numerical abbreviation is so common that it would be difficult to find one at all versed in business or practical affairs, who would not readily and properly construe such numerical abbreviations.

If a date is partly written and partly printed the statute is not satisfied.[59] So, a document dated "Sacramento April 1st 1886" wherein the words "April 1st" were written and the balance printed, was held invalid.[60] A document dated "January 12, 1904" wherein only the figures "190" were printed, was held invalid.[61]

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[53] Cal. Civ. Code, § 1277.

[54] Estate of Anthony (1913), 21 Cal. App. 157, 131 Pac. 96.

[55] Estate of Price, supra, n. 52.

[56] Estate of Carpenter, supra, n. 52.

[57] Estate of Lakemeyer (1901), 135 Cal. 28, 66 Pac. 961.

[58] Estate of Chevallier (1911), 159 Cal. 161, 113 Pac. 130.

[59] Estate of Billings (1884), 64 Cal. 427, 1 Pac. 701; Estate of Plumel (1907), 151 Cal. 77, 90 Pac. 192; Estate of Zollikofer (1914), 167 Cal. 196, 138 Pac. 995.

[60] Estate of Billings, supra, n. 59.

[61] Estate of Plumel, supra, n. 59.

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While a date may be abbreviated, it must still be definite and complete,[62] even though it need not be a correct date,[63] or a possible date.[64] The writing of a will begun on one day may be concluded on a subsequent day,[65] and the date first placed upon such a document may be adopted by the testator as the date of the instrument, even though there be a considerable lapse of time between the two occasions.[66]

In the Estate of Fay,[67] the instrument offered for probate was entirely written, dated and signed by the hand of the deceased. The date the instrument bore was "May 25 1859". In this instrument the deceased made provision for a son who was born in 1861. It was obvious that the will was not written in 1859 and the court found, by conjecture, that the will was in fact written on May 25, 1889, the numerals "59" being inserted instead of the numerals "89" by mistake or carelessness. The court held that the instrument was a will, notwithstanding that an evident mistake had been made in the year of the date. The court points out that the legislature, in Section 1277 of the Civil Code, did not use the words "truly dated" or "correctly dated," but merely the word "dated." The court indicated that, while the date is made necessary by statute, it is not a material element in the execution of an olographic will, but is merely a means of identification and aids in determining the authenticity of the will; and that the main and essential thing is that the will be wholly written and signed by the testator. To hold otherwise, the court indicated, would be to say that any difference shown between the date given in the instrument and the time when it was written would invalidate it.

This decision has been subjected to some criticism[68] upon the ground that the reasoning upon which it is based goes far toward establishing that the requirement of dating is directory rather than mandatory and that this is rather unsatisfactory, so long as it is conceded that the requirement must be obeyed. We believe that the court disregarded the effect of legislative enactment

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[62] Estate of Vance (1916), 53 Cal. Dec. 1; see Vol. V, California Law Review, 266.
[63] Estate of Clisby (1904), 145 Cal. 407, 78 Pac. 964.
[64] Estate of Fay (1904), 145 Cal. 82, 78 Pac. 340.
[65] Castro v. Castro (1856), 6 Cal. 158.
[66] Estate of Clisby, supra, n. 63.
[67] (1904), 145 Cal. 82, 78 Pac. 340.
[68] 104 Am. St. Rep. 17.

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when it stated that "the date is not an essential thing although made necessary by statute". This was, indeed, a departure from the earlier attitude of the court, as expressed in the Estate of Martin,[69] and recently approved in the Estate of Vance,[70] wherein it was held that the court was not "at liberty to hold that the legislature intended any one of the three requirements to be of greater or less importance than the other."

We are inclined to agree with the court in the statement of the rule, that a showing that an olographic will was actually made at a time different from the date written therein should not invalidate it; but it seems to us that if a date is to be regarded as an essential requirement, a line can clearly be drawn between the period of time when, during the life of the testator, a valid will was possible of execution and the period of time when it was not possible of execution. Every person over the age of eighteen years, of sound mind, may by last will dispose of his estate. Beginning with the date when a person arrives at the age of eighteen years and up to the date of his death, there is a period during which a will may be executed if the testator is of sound mind and not acting under duress, menace, fraud or undue influence. If a will is executed during this period but is dated at a time prior or subsequent to actual execution, but at a time within this period, then we would regard the date as a proper one, satisfying the statute. If, however, a will is executed during the period in which a will is possible of execution, but is dated at a time prior thereto, i. e., either before the person was born or before he reaches the age of eighteen, or subsequent thereto, i. e., after the death of the testator, then we would regard the date as improper and not a compliance with the statute. We recognize that this distinction may lead to some difficulties and may, on occasions, result harshly.[71]

If, however, we are to regard dating as an essential requirement to an olographic will, the date should at least be required to be a possible date. If we are to regard dating merely as a means of identification and not as essential, as directory in character rather than mandatory, then let the statute be so amended in order that the doubt upon this point may forever be removed.

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[69] Supra, n. 50.
[70] Supra, n. 62.
[71] It is possible that this construction could not be made arbitrarily without legislation.

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While it may seem wrong to invalidate a will because one of the figures in the date is a clerical error, does it not seem just as wrong to invalidate a will because one of the figures in the date is printed? These matters cannot be discussed along the lines of what seems right or wrong. Either the statute has been complied with or it has not been complied with. If it has, then the document is entitled to probate. If it has not, probate should be denied.

In the Estate of Vance,[72] an olographic instrument was wholly written and signed by the deceased and dated as follows:

> "I have subscribed my name and affixed my seal this 22nd day of March, in the year of our Lord one thousand."

This sentence appeared at the very bottom of the last page of the instrument. It appeared that the instrument was actually executed on March 22, 1910. The court held that

> " . . . . taking into consideration the nature, even more than the extent, of the discrepancy between the year given and the year of actual execution, the only fair inference is that Vance failed to complete the date which he had begun to write."

It was decided that the instrument was not an olographic will because "a date which is incomplete, because lacking a statement of either the day, the month or the year of execution does not satisfy the statutory definition of an olographic will."

We believe this decision to be sound. We anticipate, however, that difficulties may arise in distinguishing between an incomplete date and an abbreviated date on one hand, and an incomplete date and an incorrect date on the other hand. If the Vance will had been dated in figures, "1000", the date would evidently have been complete but incorrect, and the will would have been valid under the Fay case.

In the course of its opinion in the Vance Estate, the court gives the following date, "November 22, 19 ", as an example of an incomplete date and states that it would be regarded as insufficient. Would it require a strained construction to construe the figures "19 " as a numerical abbreviation of the year "1919"? If not, would not such a will be valid under the decisions in the Estates of Chevallier, Lakemeyer and Fay, even though it were an incorrect date? On the other hand, suppose a testator, executing a will in the year 1917, should begin to write the date, in

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[72] Supra, n. 62.

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words, and stop at that point in the date after the word "seven" and thereby fail to complete the word "seventeen". Is such a date to be regarded as complete but incorrect and valid under the Fay case or is it to be regarded as incomplete and therefore invalid under the Vance case? In such cases as these, precedents will afford little aid and each case will have to be decided upon its own peculiar facts.

VI.

An olographic will must be entirely signed by the hand of the testator.

It has for a long time been regarded as the established law of this state that Section 1277 of the Civil Code does not require that an olographic will "shall be subscribed by the testator at the end thereof." This requirement is in the language of Section 1276 of the Civil Code with reference to attested wills. Section 1277 of the Civil Code provides merely that an olographic will must be "signed" by the hand of the testator, and, in view of the distinction which the court felt the legislature had in mind between "subscribing" and "signing," it has been regarded as the rule of law in this state that a signing of an olographic will is valid, if it be at the beginning, at the end, or in any part of the document; and, if it be in the beginning or in any part of the document, that all that portion of the document following the signature is to be construed as expressing the will of the deceased and effect is to be given, if possible, to all of the language found therein.[73]

The only limitation which apparently was placed upon this rule, until recently, was, in the event that the signature appeared to be in the beginning or in the body of the instrument, that the paper must show upon its face that it is complete as a testamentary document. These early expressions of the Supreme Court of this state have practically been overruled in the Estate of Manchester.[74]

A document olographic in character written wholly by the hand of the deceased, beginning as follows: "I, Matilda Manchester, leave and bequeath" etc., was then followed by a statement of devises and bequests, and the instrument ended as follows: "Whereunto I hereby set my hand this fourteenth day of Jan-

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[73] Estate of Stratton (1896), 112 Cal. 513, 44 Pac. 1028; Estate of Camp (1901), 134 Cal. 233, 66 Pac. 227; Estate of Barker (1875), Myricks Probate Reports, p. 78; Estate of Johnson (1872), Myricks Probate Reports, p. 5; Estate of Donoho (1877), Myricks Probate Reports, p. 140.

[74] S. F. No. 7691, decided Feb. 15, 1917, 53 Cal. Dec. 220, 163 Pac. 358.

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uary 1914". The name of the decedent does not appear in or upon the paper anywhere except in the opening clause. This instrument was placed in an envelope, sealed and endorsed by the decedent in her own handwriting with the words "My will, Ida Matilda Manchester". The court, setting aside the broadness and effect of its previous enunciations, held that this document was not signed in compliance with the provisions of Section 1277 of the Civil Code. To sign, the court held, meant

> "the signature of the testator in his own handwriting written somewhere in or upon the document with the intention by so writing to authenticate the document. The name written at another place than the end of the document and not for the purpose of authenticating it and indicating its completion but merely to identify the person who is making the will cannot be deemed to be a name 'signed' to the document."

The court considered the words in the concluding clause "whereunto I hereby set my hand" etc., as indicating that they were intended by the deceased to precede a signature and that they indicated that the decedent intended to sign immediately below and failed to carry out that intention.

In distinguishing the Estate of Camp[75] and the Estate of Stratton[76] from the Manchester Estate, the court stated that the true rule is that

> "wherever placed (referring to the signature) the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document itself, that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

The foregoing now represents the latest rule enunciated by the Supreme Court with reference to the validity of a signature to an olographic will, and, in our opinion, is a more reasonable rule than was apparently laid down in the earlier decisions. One of the reasons given for the subscription of attested wills "at the

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[75] Supra, n. 73.
[76] Supra, n. 73.

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end thereof" is that it prevents the interpolation of provisions between the end of the document, as the testator left it, and his signature. This reason should be equally applicable to olographic wills. We regard it as contrary to ordinary usage for a person to sign his name to as solemn a document as a will, by merely inserting it in the exordium or by having it appear in the body thereof. Would we ordinarily regard a promissory note, or any other contract, as duly signed, if the name of the debtor or party to the contract appeared only in the opening recital or in the body of the instrument? We see no reason for a different rule existing with reference to olographic wills.

It will frequently be difficult to determine from the face of an instrument not signed at the end, whether it is a complete and executed document and the Supreme Court of this state will always have the last word upon this subject.

In the Estate of McMahon,[77] the writing was unwitnessed and unattested. It was olographic in character. In its exordium it declared, "This is the last will and testament of Elizabeth R. McMahon." Following this, the writing contained certain specific bequests and devises, with a residuary clause and a clause appointing an executor. It concluded as follows: "I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament, this second day of January, 1912." No signature followed this declaration and no signature of the testatrix appeared in any other place upon the instrument save in the exordium, as above noted.

The court, mindful of its recent expressions in the Manchester Estate,[78] announced that it must be established upon the face of the offered instrument that it is a complete and executed document; that

> "notwithstanding that the usual place of signing and so of evidencing this execution and completeness is at the end of the instrument, the signature of the testator found elsewhere than at the end may be, if circumstances warrant it, a signature of execution, but that the only evidence which will warrant this conclusion must be found in and on the instrument itself; or, in other words, that the proof of this cannot rest in parol."

The court stated that absolute precision of execution is not expected in the case of an olographic will, but that the language

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[77] S. F. No. 7779, decided Feb. 16, 1917, 53 Cal. Dec. 225, 163 Pac. 669.
[78] Supra, n. 74.

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in this case was "definite and convincing to the effect, not alone that the testatrix believed her will to be duly executed" but that the testatrix had

> "sufficiently in law on the face of the instrument adopted the signature written by herself in the exordium of her will as her signature in execution of it. If she has done this and with sufficient exactitude has stated the fact, she has in legal effect declared that she has adopted her signature, as written in the body of the will, as being the signing of it in execution of it within the meaning of the code provision, and this would be sufficient to entitle the instrument to probate."

The court held that the language last employed by the deceased clearly indicates that the testatrix had concluded her writing and thus had completed the expression of her testamentary intent and "it is a most reasonable construction of that language to say that she adopted her signature in the exordium" as her signature in the execution of the will.

While the language in the concluding clause of the instrument in the Manchester Estate is indeed different from that in the concluding clause of the instrument in the McMahon Estate, at the same time we feel that it does not necessarily appear in the McMahon Estate that it was the intention of the deceased to adopt her signature in the exordium, as her signature and authentication of the document itself. The will in the McMahon Estate was evidently drawn by a person of intelligence, who was advised with reference to legal expressions and versed, to some extent, in business transactions. We feel, therefore, that the court has probably credited the deceased with an erroneous intention concerning the effectiveness of her name as a signature as it appears in the exordium of the instrument.

Since it is so contrary to the ordinary, usual and customary act, to sign a document at the beginning or in the body thereof, the rule should be that when the signature of the deceased is found elsewhere than at the end, it must be considered invalid unless it unmistakably, definitely and unambiguously appears from the face of the instrument to have been the intention of the deceased to adopt the unusual signature as his actual signature to and in authentication of the document. In our opinion, hardly any words other than those having substantially the following meaning, "I hereby adopt the writing of my name appearing in the beginning (or body) of this instrument as my signature hereto," will indicate such an intent on the part of a testator. These are

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matters, however, upon which there may be honest differences of opinion, the final conclusion resting with the Supreme Court.

In the Estate of Manchester, it appeared that the decedent had enclosed the unsigned instrument in an envelope which she sealed and upon which she endorsed in her own handwriting the words "My will, Ida Matilda Manchester". The court held that the defect of a signature not appearing in the instrument was not cured by the words "my will", followed by the name of the deceased endorsed upon the envelope. The court indicated that the manifest purpose of the endorsement upon the envelope was to state that the paper within the envelope was the will of the deceased. It merely showed that the decedent believed that the enclosed document was her will and indicated that she believed that it was legally executed and valid, but the court proceeds to state "her belief that it was a valid will, properly executed, does not make it so." This is the first case in which our Supreme Court has squarely passed upon the question, as to whether or not an endorsement, appearing upon an envelope in the handwriting of the deceased in which there is enclosed an olographic instrument, can be considered a part of the will. The decisions from different jurisdictions vary upon this point.

While the point was first raised in the Estate of Keith,[79] it was unnecessary for the court to pass upon the question there, for the reason that one of the instruments enclosed in the envelope in the Keith Estate and which was sought to be admitted to probate, was not a testamentary document. It was urged, however, in the Estate of Manchester, that the endorsement on the envelope could be treated as a part of the document enclosed, as if it were an additional paper attached thereto, and that under the force of the decision in the Estate of Merryfield,[80] the two papers should be construed together, making a complete testamentary scheme. The circumstances, the court held, "are utterly inconsistent with the idea that the endorsement was made for any such purpose". This rule conforms strictly to a recent case decided by the Supreme Court of Arizona,[81] but is contrary to a recent decision from the State of North Carolina.[82]

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[79] Supra, n. 37.
[80] Supra, n. 45.
[81] Estate of Tyrrell (Ariz., 1915), 153 Pac. 767.
[82] Alexander v. Johnston (1916), 88 S. E. (N. C.) 785.

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We have thus fully discussed under what circumstances, in what form and to what extent, documents entirely written, dated and signed by the hand of a deceased may be considered the olographic will of such deceased.

Nat Schmulowitz.

San Francisco, California,
March, 1917.

(TO BE CONCLUDED IN NEXT ISSUE)

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Some Reasons Why the Code States Should Adopt the Uniform Sales Act*

THE purpose of this article is to recommend the Uniform Sales Act for adoption in the Code States, i. e., in California, Montana, North Dakota, and South Dakota.[1] As the Uniform Sales Act is a codification of the American common law on the subject of sales, it seems appropriate before dealing at large with the present condition of the law, to make a few preliminary remarks on the subject of codification, to show how long is its history, how wide is its prevalence, and how appropriate it is for remedying present defects in the law of these states. After these preliminary observations follows a short explanation of two conspicuous defects in the law of sales which the adoption of the Uniform Sales Act would go far to remedy. Next in order is a detailed examination showing the more important particulars in which the Uniform Sales Act would improve the law. Lastly it is shown why the objections which may be urged against the Uniform Sales Act are unsubstantial.

Preliminary Survey of Codification.

Codification is the act or process of reducing all the law upon one or more general subjects to a code. It is a new, systematized statement of the law, enacted as one statute.[2]

The ancient world.—A thousand years of legal development in Ancient Rome beginning with the Twelve Tables culminated in

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*This article is largely a reproduction, with some changes and elaborations, of the material in an article by the same writer entitled, "Some Reasons Why North Dakota Should Adopt the Uniform Sales Act" which appeared in the Quarterly Journal of the University of North Dakota, vol. 7, pp. 54-69 and 120-153 (Oct., 1916 and Jan., 1917). The editor of the Quarterly Journal has kindly extended permission to make free use of that material for the present article. The justification for expanding that article into this present form is that much of the argument has general as well as local application, and that even what is merely local usually applies in all four of the Code States, the legal situation under the Field Code being in all very similar.

[1] Since this article was prepared the Uniform Sales Act has been adopted in North Dakota, following the suggestion to that effect in the Quarterly Journal mentioned in the above note.

[2] From Anderson's Dictionary of Law (1893), p. 190. See also Bouv. L. D. (8th ed., 1914), p. 507.

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an epoch-making period of codification.[3] The most thorough work of codification which this period produced is that which bears the name of Justinian. Justinian's codification has stood the test of time, has preserved to the modern world the laws of Ancient Rome, and has thus furnished to much of the modern world a large part of the foundation upon which its present day law rests.[4] It is said to be a masterpiece of legal achievement, whose superiority over the heterogeneous mass of law which preceded it is universally recognized.[5]

Modern European codes.—Further codification of the law has in more recent times taken place in Continental Europe. The old German Code goes back to Frederick the Great. The Code Napoleon,[6] framed a little over a hundred years ago, has been widely followed in Europe outside of France as well as where it originated, and forms the basis for the law of South America, Central America, Mexico, and Louisiana.[7] In recent years the new German Code,[8] the most thorough work of general codification that has yet appeared,[9] was adopted in the German Empire and has become the basis for legislative codification in Russia, Switzerland, and Japan.[10]

Anglo-American experience.—(a) *Archaic codes.*—At the dawn of English political history we have some "laws" which were general enactments to sum up what had preceded, based on man's memory, custom, etc., but not on any records of either legislative or court proceedings.[11] These old laws still exercise the anti-

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[3] Hadley, Introduction to Roman Law (1911), p. 1. For a systematic account of this development see Muirhead, Introduction Historique au Droit Privé de Rome (1889). For a shorter, concise account see Sohm's Institutes of Roman Law (Ledlie's Translation, 3d ed., 1907), §§ 9-22.

[4] Sohm's Institutes of Roman Law (Ledlie's Translation, 3d. ed., 1907), §§ 22, 28.

[5] See e. g., Jenks, Edward I, in 1 Select Essays in Anglo-American Legal History, p. 160.

[6] See Wright, Translation of French Civil Code (1908).

[7] Pound, Outlines of Lectures on Jurisprudence (1914).

[8] See Wang, Translation of German Civil Code (1907).

[9] Ames, Lectures on Legal History (1913), p. 368.

[10] Pound, Outlines of Lectures on Jurisprudence (1914).

[11] See Thorpe, Ancient Law and Institutions of England; Schmid, Gesetze der Angelsachsen (1858); Lieberman, Gesetze der Angelsachen (1898). A convenient collection illustrating the character of these laws may be found in the earlier part of Stubb's Select Charters (9th ed., 1913). Also compare these laws with the archaic law of the German tribes, for which see the "Leges Barbarorum," and with archaic Irish Law, in the Brehon Laws.

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quarian and the legal historian, but have long since become obsolete as rules of law by which to settle any controversy between litigants.

(b) *Unsuccessful projects.*—Apart from these ancient laws, based on mere oral tradition, which have now been antiquated for a thousand years, the Anglo-American system of law has never in its entirety been systematically codified. Instead of codified law we have had a heterogeneous body of law consisting of the common law, so-called, a mass of decided cases occuring in litigation, and the statute law, a mass of separate statutory enactments. There have been accessible court records since the time of the "Year Books,"[12] but no systematic general codification has yet resulted. From the time of Henry VIII to our own day various projects for codification of the whole law have been undertaken,[13] but without the indispensable culmination in statutory enactment as law of the codes proposed.

(c) *The Field Codes.*—The most important attempt to codify the whole law was made in the United States a little more than fifty years ago. The result was the Field Codes, drawn up by a little group of New York lawyers of which Mr. Field was the leading member, as a codification of the American common law. As a complete system these codes failed of legislative enactment in New York, as they did in most of the other states. One of them, the Code of Civil Procedure, has been widely adopted, while in the four states of California, Montana, North Dakota, and South Dakota all the Field Codes were adopted in their entirety.[14] The failure of the Field Codes to secure legislative enactment into law is attributed mainly to two causes, the crudeness of the codes themselves, and the conservatism of the bar trained under the English common law system toward any such innovation as codification of the whole law.[15]

(d) *Private codification.*—In recent times we have had, both

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[12] I. e., since the time of Edward I. See Year Books edited by Horwood in the Rolls Series. See also, Reeves, History of English Law (1880); Pollock & Maitland, History of English Law (2d ed., 1898).

[13] Pound's Outlines of Lectures on Jurisprudence (1914). The project under Henry VIII, Bacon's Project (1614). Lord Westbury's plan (1860-1863).

[14] It should be noted in this connection that the Codes, where once adopted, have never been repealed.

[15] Williston, in 63 Pennsylvania Law Review 197.

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in England and in this country, some attempts by various individuals, frequently law professors, to state some branch of the law in definite propositions compiled in one book. Such is, for example, Wigmore's Pocket Code of Evidence.[16] These attempts at codification by individuals, on their own responsibility, of course, have not the binding force of statutory enactment. They serve the purpose, however, of reducing the law to definite statements as guides to courts and practitioners, and in a measure pave the way for more thorough codification.

(e) *Commissioners on Uniform State Laws.*—The most important practical steps in the direction of codification in recent years in the United States have been taken by the Commissioners on Uniform State Laws. They act for the American Bar Association in drawing up codes for certain branches of the law, and recommending the draft codes to the legislatures of the various states for adoption. Some of the draft codes recommended by the Commissioners are the Negotiable Instruments Law, the Uniform Sales Act, the Partnership Act, the Warehouse Receipts Act, etc.[17] So far the Negotiable Instruments Act has met with widest approval, having been adopted in most of the states.[18] Some have only recently been agreed upon and recommended, while others are still in preparation.

The Uniform Sales Act, which it is the purpose of this article to recommend for adoption, is one of these Acts or partial codification originating with the Commissioners on Uniform State Laws. It was drawn up by a recognized authority on the law of sales, Professor Samuel Williston of the Harvard Law School. His drafts were for several years submitted to elaborate examination and criticism, and several revisions were made. The final draft was agreed upon by the Commissioners in the year 1906

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[16] Other examples may be given, as Wigmore, Summary of Torts, in 2 Wigmore, Cases on Torts. A similar tendency appears in the black letter propositions in the West Publishing Company's Hornbook series.

[17] For a complete list of the Uniform Acts recommended, and the states where each has been adopted, see Am. Bar Ass'n Rep., 1915, p. 913. The Commissioners on Uniform State Laws also publish copies of their proceedings containing this information together with much other valuable material. Copies may be obtained on application to the Secretary, George B. Young, Newport, Vermont.

[18] Am. Bar. Ass'n Rep. 1915, p. 913. Also see Brannan, Negotiable Instruments Law (2d ed.); Crawford, Negotiable Instruments Law (4th ed.).

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and recommended to the states for adoption.[19] The Uniform Sales Act has, up to the present time (March, 1917), been adopted in sixteen American jurisdictions: Arizona, Connecticut, Illinois, Maryland, Massachusetts, Michigan, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Wisconsin, Wyoming, and Alaska.[20] It will be seen by the geographical location of most of these states, that the older and more highly developed commercial section of the country has, for the most part, already adopted the Uniform Sales Act, and that among the states which have adopted it is New York, whose court decisions are, with us, such persuasive precedents on account of our living under the Field Code which was drafted in New York.

Summary of history of codification.—From this cursory view of the history of codification it is apparent that codification is a natural step in the development of law, that it has come after a period of development in ancient as well as in modern times, and that at the present time practically all the advanced nations of the world, the English-speaking excepted, live under some form of codified law the history of which goes back to Justinian's codification of the law of Ancient Rome. Even in the English-speaking world codification has for a long time been a favorite project with many reformers and is in our own day gradually becoming an accomplished fact.[21]

Why Codification is an Appropriate Method of Law Reform in the Code States.

The Field Codes the basis of our law and practice.—In recommending the Uniform Sales Act for adoption in the Code States the arguments for and against general codification need not at length be repeated. We are in the Code States committed, so to speak, to the principle of codification by having adopted the Field Codes. Under the Field Codes we have lived for at least a generation. As lawyers we have become habitual code-readers on every legal question that arises. As a people we have had more than the usual occasion for becoming imbued with the idea, however mistaken, that the answer to every disputed question

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[19] See preface to Williston, Sales.
[20] Am. Bar. Ass'n. Rep., 1915, p. 913.
[21] For a bibliography of the literature of codification, see Pound, Outlines of Lectures on Jurisprudence (1914), § XIV.

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of law is to be found in the statute book. Seldom, indeed, in the trial court, does either lawyer or judge attempt to go much deeper into the question of law involved if they can find a specific code provision in point.[22] The work of harmonizing and piecing out the code provisions is generally left to the higher courts on appeal, and even those courts often dismiss their discussion of the merits of a question by a curt reference to a code section as controlling.[23] Having adopted the Field Codes in their entirety and lived under them for a generation or more without thought of their repeal, we certainly have effectively approved the principle of codification.

Modifications by legislative enactment.—As we are not averse to codification but rather emphatically committed in its favor, so we are committed to revisions of the codified law we have if it seems that improvement can thereby be secured. It is axiomatic that a complete and final code is impossible.[24] As conditions change and development takes place in the world about us, to which the law is to be applied, new conclusions must be worked out from old principles, and from time to time these new developments ought to be worked into the code by revisions.[25] Such, indeed, has been the practice so far as our legislative history is concerned. Never a legislative session passes that there is no amendment to our Code, nor are these amendments always confined to mere details.[26] These legislative changes have from time to time been worked into the Code at each periodical revision. Starting with the code that is based upon the common law, derived from judicial decisions, we have made legislative changes in it and incorporated these changes in code revisions. Our legislative history, therefore, warrants the statement that we are committed to the principle of codification, and

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[22] Even the most casual attention, in observing the trial of cases in court, will sustain the accuracy of this remark.

[23] Instances of such dealings with cases may be cited at random: Cysewski v. Fried (1912), 24 N. D. 152, 139 N. W. 104; Catlett v. Stokes (1906), 21 S. D. 108, 111, 110 N. W. 84; In re Grogan's Estate (1909), 38 Mont. 540, 100 Pac. 1044; Baker v. Baker (1909), 9 Cal. App. 737, 100 Pac. 892.

[24] Terry, Leading Principles of Anglo-American Law, § 609.

[25] Ibid.

[26] Extended reference to support the statement of such a well-known fact is unnecessary. In California and North Dakota, where the annotations to the Code are elaborate, the Code reveals in its very pages the frequency of such amendments and changes.

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are also committed to the propriety of legislative changes in our codified law whenever such changes can remedy defects and secure substantial improvement.

Codification of modern development in case law necessary for completeness.—The original Field Codes were based largely on case law, the product of judicial decisions, existing in America at the time they were drafted. Since that time, as before, with the constant course of litigation, case law has been developing throughout the country.[27] The developments in the case law, however, have not yet been worked into our Code. Our code revisions have thus been only partial in their character, taking account of the legislative changes, but taking no account of the progress which is made in the law through the process of judicial decision. To complete the system of code revision, to let it embrace not only the legal progress brought about by legislation, but also the progress brought about by judicial decision, the more recent case law must be codified and that codification adopted as part of our code sytem. A thorough codification of the recent case law on the subject of sales is presented in the Uniform Sales Act. Far from being a startling departure, therefore, the adoption of the Uniform Sales Act would, with us in the Code States, be only a simple matter of course. Completing our code revision by including this codification of countrywide judicial decision, the adoption of the Uniform Sales Act would make no startling changes but would bring our code into accord with the law of the time.

Some Present Defects in Our Law.

Stronger reasons, however, than merely the advantage of embodying the law we have in a definite code suggest themselves for the adoption of the Uniform Sales Act. It is the purpose in this article to point out briefly two conspicuous defects in our law, and to indicate how these defects can be in some measure corrected by the Uniform Sales Act. These defects are: first, lack of uniformity with the law of other states; and second, lack of certainty as to what our own local law is.

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[27] In recent years the increase in the current output of case law has become so marked that the problem of keeping abreast with this "welter of decisions" has become a frequent topic of consideration at bar association meetings and other gatherings of men professionally interested in the legal situation.

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Lack of uniformity with the law of other states.—The first of these defects, lack of uniformity with the law of other states, is constantly leading to confusion, especially in commercial matters, as transactions on an increasingly large scale involve action in different states governed by divergent laws on the same subject matter. Thus, with a promissory note made in North Dakota, payable to a person living in Minnesota, and by him indorsed in Iowa or Chicago, etc., if the laws of each of the respective states are different in regard to these simple transactions relative to a single negotiable instrument, the greatest uncertainty and confusion as to rights of the different parties must result. To remedy this situation in regard to negotiable instruments, the Negotiable Instruments Law, the first and crudest of the Acts proposed by the Commissioners on Uniform State Laws, has been adopted in nearly all the states of the Union.[28] The lack of uniformity between the laws of different states in regard to other commercial transactions, notably in regard to sales, bills of lading, etc., is equally conspicuous, though less progress has been made in curing the defect.[29] It is a matter of every-day occurrence that goods are bought in one state by parties living in another, and that goods are shipped from state to state. Without uniformity as to when delivery of possession is essential to a valid sale, as to what is good consideration to make a contract binding for the sale of goods, as to what is necessary to be done to pass title, etc., such every-day transactions can be carried on only with the risk of financial loss and disappointment in litigation whenever anything occurs to upset the calculations of the parties or to cause disagreement between them over their bargain.

It is needless in this article to examine at length the evils caused by lack of uniformity between the different states in regard to their commercial law. Every recent report of the American Bar Association contains statements and arguments from the Commissioners on Uniform State Laws covering elaborately this phase of the question.[30] It is primarily to remedy this situation throughout the country as a whole that the Uniform

[28] Am. Bar Ass'n Rep., 1915, pp. 913, 914.

[29] Am. Bar. Ass'n Rep., 1915, p. 914, shows that the Uniform Sales Act has so far been adopted in sixteen jurisdictions, as against forty-seven jurisdictions which have adopted the Negotiable Instruments Law.

[30] See, for example, Am. Bar Ass'n Rep., 1915, pp. 919-948, and the Report for 1914, pp. 1044-1089.

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Acts, including the Uniform Sales Act, have been proposed for adoption. The difficulties arising from lack of uniformity are present with us, as they are in other states. The Uniform Acts can succeed in overcoming them only so far as they are generally adopted by the different states. By adopting the Uniform Sales Act we therefore not only improve our own law in this respect, but contribute that much toward improving the law of every other state throughout the country.

Lack of certainty.—The second defect in our law with which this article is concerned, the lack of certainty as to what our own local law is, touches us even more closely than the lack of uniformity with the law of other states. It is a defect in which the law of most of the Code States is very conspicuous. Every lawyer in active practice knows how difficult it often is to advise a client who comes to consult him. The lawyer's difficulty may be due of course to uncertainty as to what actually happened to cause the trouble. It is frequently due, however, to the impossibility of finding out what the rule of law is.

(a) *Lack of certainty as to the facts involved.*—Lack of certainty as to the facts in dispute between parties is of course a problem inseparable from litigation. Where two parties get into a controversy it often happens that they disagree as to what words were spoken in their dealings with each other, that they disagree as to the quality of the goods supplied, etc. Where the parties disagree as to the facts, where there is no agreement as to what really happened, no lawyer can presume to be omniscient enough to foretell with exactness what the jury, on consideration of all the evidence, may find the facts to have been. No legislation, and no amount of litigation, can preclude occasional disagreement between parties as to what actually happens in their current transactions. Such disagreement will lead to litigation so long as neither will yield the whole point and parties are law-abiding enough to resort, not to brute force, but to the orderly process of law for the settlement of their controversies. Lack of certainty as to the facts is therefore inevitable in ordinary litigation.

(b) *Lack of certainty as to what the law is.*—Lack of certainty as to what the legal rule is, as distinguished from lack of certainty as to what are the facts involved, is a defect which

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can be measurably remedied, but which, while it remains, produces quite as much expensive and unsatisfactory litigation as is produced by lack of certainty as to the facts. How often our Supreme Courts preface their opinions, in deciding cases, with the remark that there is practically no dispute as to the facts involved![31]

The lack of certainty as to what our own local law is, is due mainly to two causes. First, the Code under which we live was a crude first attempt at general codification made by men who were too few and too busy with the duties of an active law practice to study with sufficient care and arrange and correlate effectively all the law they were called upon to codify. The Code, furthermore, was drawn up more than fifty years ago when the conditions under which business was done were very different from what they are now, and when many of the questions which now occur and recur had never arisen. Our Code, therefore, is not only a crude piece of codification,[32] but is also entirely silent on many vital questions of commercial importance.

The second cause for the lack of certainty in our local law is the meagerness of our own authoritatively binding decisions, in comparison with the immense array of conflicting precedents from other states, all of which are more or less persuasive but none of which are binding upon us as authorities. Our local reports number only relatively few volumes. The number of volumes of reports of decisions from other states, which are for us persuasive but not binding authorities, runs into thousands. Our line of local decisions goes back only about thirty-five years. The decisions in many other states go back a hundred years or more, and for the period before that, the English cases go back hundreds of years further still.[33] Our local decisions have

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[31] The following are a few North Dakota cases cited at random as illustrations: Bauer v. Union Central Life Ins. Co. (1911), 22 N. D. 435, 133 N. W. 988; Greenleaf v. Minneapolis, St. P. & S. S. M. Ry. Co. (1915), 30 N. D. 112, 151 N. W. 879; Ellison v. City of Lamoure (1915), 30 N. D. 43, 151 N. W. 988; Harney v. Wirtz (1915), 30 N. D. 292, 152 N. W. 803; Hart-Parr Co. v. Finley (1915), 31 N. D. 130, 153 N. W. 137.

[32] Williston, in 63 Pennsylvania Law Review 197.

[33] This description fits particularly the states of Montana, North Dakota, and South Dakota. The lack of local reports is not so conspicuous in California, this state being considerably older and having a correspondingly longer line of local decisions. The argument from the crudeness of the Field Code applies in full force in California, however, while the argument from lack of uniformity with other states carries

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decided relatively few questions in comparison with the number of questions that have arisen and been passed upon, taking the courts the country over. These decisions from other states, however, are often conflicting, while all are more or less persuasive as precedents. Without local decisions in point we are therefore in a conspicuously worse position, so far as certainty of the law is concerned, than many of the older states, each with its own line of authoritative decisions settling its own local law.

The difficulties produced in practice by the lack of certainty as to what the law is may be conveniently illustrated by a concrete example. A farmer orders a machine from a machine company, to be delivered a certain time later. Before the time for delivery something happens to cause him to change his mind. He notifies the company that he does not want the machine. The company, insisting upon its contract, ships the machine and claims the contract price. What are the rights of the parties?[84] If the company sues the farmer for breach of his contract it will recover damages for the breach, i. e., it will recover the difference between the contract price and what the company could obtain on a re-sale of the machine.[85] This may be nothing at all, and is ordinarily likely not to be a great deal, for example, $100. If the company is allowed to recover the full contract price it will foist the ownership of the machine upon the farmer without his consent, and will get, if the machine is an expensive one, several thousand dollars. At this stage the farmer consults a lawyer to find out whether he must take and pay for the machine or whether he need only pay such damage as results to the company from his refusal to take it. The lawyer looks up the Code and finds nothing decisive on the question whether title can be cast upon a person without his consent to receive it. He next looks diligently through his set of local reports. He looks next at the authorities from other states for guidance. In a number of states the question has not been decided. It has been decided in a considerable number of states, but different

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even greater weight there than in western states generally, since there is even more interstate business. For a more elaborate description of this situation with reference to the country at large, see Williston, in 63 Pennsylvania Law Review 203.

[84] This illustration is taken from a recent North Dakota case: Hart-Parr Co. v. Finley (1915), 31 N. Dak. 130, 153 N. W. 137.

[85] Mechem, Sales, §1690, and numerous authorities cited.

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states have decided it in different ways.[36] Some have decided that if a person contracts to receive title, the title may thereafter be forced upon him without any further consent to receive it. Others have decided that a contract to buy goods, like any other contract, may be broken by either party, the party breaking it becoming liable to pay damages for the breach. Having exhausted the available material for finding out what the law is, what is the lawyer to tell his client? If he is thoroughly candid he can only tell him that the law in his jurisdiction is yet undecided on his question, but that if the client cares to bear the expense of litigating the case till it can reach the Supreme Court his question may be decided. Still, which way it will be decided he can only guess.

That the above illustration as to uncertainty in the law is not unique but typical, as applied to the law of sales, may be demonstrated even by a casual glance at the extensive list of questions which will be later presented in regard to which the Uniform Sales Act provides definite rules of law where our codes and local case law are silent or inconclusive. These examples, of course, cannot purport to be a complete enumeration of the matters in regard to which our law of sales is uncertain. They are enough, however, to indicate that in regard to many ordinary commercial transactions it is impossible to tell with any certainty, in advance of litigation on the particular point, what the rule of law actually is.

The condition of our present law of sales is, therefore, curtly expressed in the one word "uncertainty". The Code is silent on a great many important questions. Relatively few of these have yet been decided by our highest courts. On many of them the authorities from other states are in more or less conflict. Every such question with us, therefore, presents a problem on which no lawyer can satisfactorily advise his client in advance. To get it settled involves the painful, dilatory, expensive, and uncertain process of litigating every point and appealing it to our local Supreme Court for final decision. This process touches but a single point at a time, leaving the old uncertainty still prevailing as to which way our court will hold

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[36] Mechem, Sales, § 1694. See also elaborate collection of authorities on each side of this question in Williston, Sales, §§ 563-66.

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on all the other questions. This is our condition, too, while many of these questions have been variously dealt with by other courts, whose decisions, though not always very helpful as precedents because too conflicting, have supplied the material embodied in definite rules found in the Uniform Sales Act.

(c) *Certainty the prime requisite.*—Lest it be thought that a fetish is here made of legal certainty, a few words must be said on the question whether certainty is preferable to growth and development in the law.

Activity and change is the law of life. Everything which is in process of development must contain some elements of uncertainty. Technical rules of law form no exception to this general law of life. When the law ceases to grow the law is dead.[87] Every legal rule must in course of time be subjected to a process of growth and development which may change the force of its application. Every legal rule, like every moral precept, must be subjected to a process of progressive interpretation.[88]

On the other side, without some regularity in application there can be no rule of law at all. As has been aptly said, "Law is the quality of being uniform and regular in a series of events, whether in human or in external nature."[89] Constant change in the law produces so much uncertainty that the rule of law itself is apt to be lost. Law which is in the process of growth must necessarily be somewhat uncertain. Then, is our alternative the unpleasant one of growth with uncertainty or certainty with stagnation?

The solution of the problem thus presented is found in two directions. In the first place, we must determine the relative importance of growth or of certainty in any particular field to which the law is to be applied. There are parts of the law where it is important that growth should be easy, where the importance of a set rule is of minor consequence. Thus, what

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[87] Holmes, The Common Law (1881), p. 36.

[88] The most conspicuous illustration of this process as applied to definite legal rules is to be found in the Roman legal development under the Twelve Tables, which in theory remained unchanged for a thousand years. See Sohm's Institutes of Roman Law (Ledlie's Translation), §12. See also Muirhead, Introduction Historique au Droit Privé de Rome (1889).

[89] Wigmore, Summary of Torts, § 2, in 2 Wigmore, Cases on Torts, Appendix A.

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is reasonable force to use in expelling a trespasser may vary with circumstances and may change with the times. The determination in the particular case is of minor consequence as far as it affects the rights of other parties. So, speaking generally, though it is impossible to make sharp distinctions here, the rules of law governing ordinary human conduct should be capable of ready development to fit the cases to which they have to be applied. On the other hand, there are some situations in which the importance of having a definite rule understood by the parties is far greater than the importance of change and growth in the particular rule adopted.[40] The conventional example of the law of the road affords a ready illustration. It is highly important, especially in this age of automobiles, that parties should know to which side to turn to avoid collision, but it is of little or no intrinsic importance whether the rule requires them to turn to the right or to the left. So, in the law of property, it is considered more important to preserve the rules as they are, which people may find out in order to adjust their dealings accordingly, than to make frequent changes to remedy particular cases of hardship, because the ultimate result of frequent changes in property law will be to shake titles and undermine the security of acquisitions, which will destroy the incentive to accumulation of property.[41]

In which class of cases do commercial transactions fall? Do they call for ready growth and change in the rules of law, with consequent uncertainty, or do they call for certainty as the most important consideration? The answer must be in favor of certainty. Unless, for example, there were some assurance that the obligation to pay debts would continue to be recognized by the law, money would be lent only at extortionate rates, and development of the country's resources on the basis of conservative credit would be impossible. Unless there is certainty in the laws affecting commercial transactions, such as buying and selling, and the giving of credit, such transactions can be entered into only

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[40] The suggestion that rules of law applicable to conduct should be flexible for the sake of securing justice in administration, while rules of property should be rigid, for the sake of security of acquisitions, is derived from lectures by Professor Pound, now Dean of the Harvard Law School, in a course on Jurisprudence.

[41] See, e. g., John Stuart Mill, Principles of Political Economy, Book V. ch. 8, § 1.

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at the risk of disappointment and litigation. If the rules of law are certain, parties may find out in advance what they are and regulate their conduct accordingly. If the rules of law are settled, business can be done more effectively because done with greater security.[42] Even if no inquiry be made in advance, if the rules of law are settled, a controversy can usually be settled without litigation, or, at most, by a trial of the facts in the lower courts. Without reasonable certainty as to the rules of law governing their transactions parties cannot go far in the ordinary present day commercial transactions at all. The greater the certainty as to the rules of law the greater is the security with which business can be done,[43] and the greater is the opportunity for settling controversies without resorting to litigation.

The second answer to the alternative of growth with uncertainty or certainty with stagnation is found in the fact that even conventional rules, laws of property, and codified law, are themselves subject to a slow process of progressive interpretation,[44] and can even be changed by legislative fiat, like any other laws, if such change seems necessary. The alternative is not one between growth and stagnation, but merely a question of where the emphasis is to be placed, on ready change, or on such certainty as will enable business to be carried on with reasonable security.

The conclusion therefore is that, as to commercial transactions, such as sales, the prevailing uncertainty of our law is not a boon indicative of healthy growth, but an evil hampering the conduct of business which has been tolerated only because apparently inevitable. If this uncertainty is not inevitable but in a measure avoidable, through the adoption of the Uniform Sales Act, we should all be willing, by adopting that Act, to reduce uncertainty to certainty.

The inquiry follows how the adoption of the Uniform Sales Act would contribute to cure the evils of uncertainty and of lack of uniformity which have been here set forth.

Lauriz Vold.

University of North Dakota,
Grand Forks, North Dakota.

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[42] See John Stuart Mill, Principles of Political Economy, Book V, ch. 8, § 3.

[43] Adam Smith, Wealth of Nations, Book III, ch. 2.

[44] See n. 38, supra, on the progressive interpretation under the Twelve Tables.

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CHANGES IN LAW REVIEW AND IN SCHOOL OF JURISPRUDENCE

THE war has thus far resulted in the loss to THE REVIEW of five members of its staff,—Messrs. Hamilton, the student editor-in-chief, Hollins, the student business manager, Calkins, of the faculty board of editors, Arndt and Whitton, of the student board of editors. All of these men have offered their services to their country in the great cause of liberty and democracy. Miss Esther B. Phillips will be student editor-in-chief during the coming year.

The public service has also claimed two members of the faculty of the school, Dr. John U. Calkins, Jr., and Mr. Herman

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H. Phleger. It has not yet been determined by whom their courses will be given. Professor Kidd will be absent on leave during the first semester. His courses in Evidence and Criminal Law will be given by Professor Eugene A. Gilmore of the University of Wisconsin School of Law.

To meet the new demands arising out of the war the School of Law will offer several new courses. An advanced course in International Law, discussing the problems raised by the great war will be offered by Professor Elliott. Professor Wright will supplement his course in Admiralty, by offering a seminar course in Admiralty and Maritime Law. Provision will also be made for a course in Military Law.

Comment on Recent Cases

CORPORATIONS: SURVIVAL OF STOCKHOLDERS' LIABILITY FOR TORTS.—Holding that the liability of a stockholder for the torts of the corporation under the California statute,[1] which provides that the stockholders shall be personally liable for all the "debts and liabilities contracted or incurred" by the corporation, is not penal in its nature, but contractual and remedial, the court in *Lininger v. Botsford*[2] decided that it would survive and could be enforced against the estate of a deceased stockholder.

It is a general rule, applicable both at common law and under the statutes of the several states, that causes of action based upon contract survive the death of either party and may be enforced by or against his personal representative,[3] and that actions for statutory penalties do not survive the death of the wrongdoer.[4] In accordance with this general rule, it is held that where the statutes are remedial and the liability is contractural in character, the cause of action against the stockholders for corporate debts survives;[5] but where the liability is penal in character, the cause of action based thereon does not survive.[6]

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[1] Cal. Const. Art. 12, § 3; Cal. Civ. Code, § 322.

[2] (Dec. 26, 1916), 24 Cal. App. Dec. 1, 163 Pac. 63.

[3] Iron Gate Bank v. Brady (1902), 184 U. S. 665, 46 L. Ed. 739, 22 Sup. Ct. Rep. 529; Janin v. Browne (1881), 59 Cal. 37; Cal. Code Civ. Proc., § 1582; 1 C. J. 181.

[4] United States v. Theurer (1914), 213 Fed. 964; People v. Newcomb (1912), 75 Misc. Rep. 258, 135 N. Y. Supp. 151; Allen v. Petty (1900), 58 S. C. 240, 36 S. E. 586.

[5] Cochran v. Weichers (1890), 119 N. Y. 399, 23 N. E. 803, 7 L. R. A. 553. See Major v. Walker (1913), 23 Cal. App. 465, 138 Pac. 360.

[6] Diversey v. Smith (1882), 103 Ill. 378, 42 Am. Rep. 14.

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In the principal case the liability of the stockholders for the torts of the corporation is not penal in nature; it is not a liability in the form of a forfeiture for the failure to do, or for the doing of something required or prohibited by statute, irrespective of the amount of injury occasioned to those for whose benefit the statute is to operate.[7] In so far as the stockholders' liability applies to the debts of the corporation, it is apparent that the liability is of a contractual nature; the intending stockholder undertakes to be bound by the general law, which is construed to involve an offer on the part of the stockholders to become personally liable for their proportionate share of the corporate debts contracted while they are stockholders.[8] But the conception of the contractual nature of the stockholders' liability for the torts of the corporation is difficult to understand. It is rather strained to say that the stockholders offer to assume liability for damages to any one who may be injured by the tortious acts of the corporation. On the other hand, it is not a direct tortious liability, which even though statutory would abate on the death of the wrongdoer, unless it is expressly provided that the liability survives.[9] It is more like the liability of a surety; the stockholders are not considered the wrongdoers themselves and their liability is primary only in the sense that it is not necessary that the person injured by the tortious act of the corporation should first exhaust his remedies against the corporation before proceeding against the stockholders.[10] It may be better to consider the stockholders' liability for torts of the corporation simply as a statutory liability, which the legislature intended should survive. In so far as the statute imposes a stockholders' liability for the debts of the corporation, it is reasonable to hold that the liability is contractual in nature and should not die with the stockholder.[11] It appears reasonable to hold that the liability for the torts of the corporation imposed by the same statute was intended to be as complete as that for the debts of the corporation, i. e., that this liability should survive the stockholder.

F. H. M.

DEEDS: A FRAUDULENT GRANTEE FROM AN ILLITERATE GRANTOR CAN PASS NO TITLE TO A BONA FIDE PURCHASER.—The

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[7] Cable v. McCune (1858), 26 Miss. 371, 72 Am. Dec. 214; Rider v. Fritchey (1892), 49 Ohio 285, 30 N. E. 692, 15 L. R. A. 513.

[8] Kennedy v. Cal. Sav. Bank (1892), 97 Cal. 93, 31 Pac. 846, 33 Am. St. Rep. 163; Ferguson v. Sherman (1897), 116 Cal. 169, 47 Pac. 1023, 37 L. R. A. 622; 2 Morawetz, Private Corporations (2d. ed.), §§ 870-872; 4 Thompson, Corporations (2d ed.), § 4790.

[9] Harker v. Clark (1881), 57 Cal. 245; Fowden v. Pac. Coast S. S. Co. (1906), 149 Cal. 151, 86 Pac. 178; Penn. Co. v. Davis (1891), 4 Ind. App. 51, 29 N. E. 425.

[10] Foreign Mines Dev. Co. v. Boyes (1910), 180 Fed. 594; see 1 California Law Review, 61.

[11] Richmond v. Irons (1887), 121 U. S. 27, 30 L. Ed. 864, 7 Sup. Ct. Rep. 788; supra, n. 5.

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term "bona fide purchaser," signifies to the layman a person entitled in all cases to the protection of the law. While it is the policy of the law to accord this protection whenever possible, as in the case of purchasers of negotiable bills and notes,[1] bona fide assignees of mortgages for valuable consideration[2] and other cases, it must be recognized that there are certain limits to the application of this doctrine. In cases of forgery[3] and alteration,[4] or larceny at common law,[5] the bona fide purchaser cannot recover, on the theory that the instrument is not the act of the party, and there is no intent on the part of the maker to put the paper into circulation. If, however, the maker has been negligent, there may be a recovery against him.[6] The case of *Chickasaw Loan and Trust Company v. Mills*[7] presents a situation where the bona fide purchaser of a deed was not protected. In that case, the original grantor, an illiterate Indian, signed a deed to a certain tract of land, induced by the fraud and deceit of the grantee to believe that he was signing a mortgage for groceries. It was held that the plaintiff, a bona fide purchaser from the fraudulent grantee, could not obtain the land, the deed not being the act of the defendant, by reason of the manner in which it was obtained, the deceit practiced amounting to forgery under the law of Oklahoma.[8] The decision was based on the ground that the deed not being the act of defendant, no title passed, nor could there be estoppel because the defendant neither intentionally nor negligently furnished the means by which the plaintiff was deceived into parting with value.

It is agreed that one who is negligent in signing an instrument without knowing the contents is liable thereon to third parties. The question is when is one guilty of negligence? In the case of

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[1] Daniel, Negotiable Instruments (6th ed.), Chap. 24, p. 885; N. I. L., § 57; 3 R. C. L., Bills & Notes, § 207.

[2] Sanford v. Pettit (1890), 83 Mich. 499, 47 N. W. 357; Satterthwaite v. Ellis (1901), 129 N. C. 67, 39 S. E. 726; Carpenter v. Longan (1872), 16 Wall. 271, 21 L. Ed. 313; 27 Cyc. 1183.

[3] Hamilton Nat. Bank v. Nye (1906), 37 Ind. App. 464, 77 N. E. 295, 117 Am. St. Rep. 333; Yakima Valley Bank v. McAllister (1905), 37 Wash. 566, 79 Pac. 1119, 107 Am. St. Rep. 823, 1 L. R. A. (N. S.) 1075 and note. As to deeds see: Bagot v. Chapman (1907), 2 Chan. 222; Thoroughgood's Case (1852), 6 E. R. C. 202; Grimsley v. Singletary (1909), 133 Ga. 56, 65 S. E. 92, 134 Am. St. Rep. 196 and note; White v. Graves (1871), 107 Mass. 325, 9 Am. Rep. 38, 40; Somes v. Brewer (1824), 2 Pick. 184, 13 Am. Dec. 406, 419; Devlin, Deeds (3d ed.) Vol. 3, § 1275, p. 2381; Marden v. Dorthy (1899), 160 N. Y. 39, 54 N. E. 726, 46 L. R. A. 694 and cases cited in principal case.

[4] Daniel, Negotiable Instruments, Chap. 43; N. I. L., § 124; 3 R. C. L. Bills and Notes, §§ 213-215.

[5] Brannan, Neg. Inst. Law, § 16.

[6] The question of negligence is one of fact to be submitted to the jury: Abbott v. Rose (1873), 62 Me. 194, 16 Am. Rep. 427; Griffiths v. Kellogg (1876), 39 Wis. 290, 20 Am. Rep. 48.

[7] (Okla., June 27, 1916), 158 Pac. 1156.

[8] Criminal Code of Oklahoma, § 2646.

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a person who can read, the general rule is that if he fails to examine the contents of the instrument he signs he is estopped to deny its validity.[9] But the cases differ as to what constitutes negligence on the part of a person who cannot read. In cases involving ordinary contracts, the decisions are about equally divided, between those which make the duty absolute that an illiterate person have the manuscript read to him by a person in whom he has a right to place confidence,[10] and those which make no such requirement.[11] In cases involving negotiable paper it is generally held that if a person, who cannot read, signs a bill or note without having it read over to him, relying on the representations of the payee, he is liable thereon to a bona fide purchaser.[12] It has also been held that if a note is signed in the belief that it is a paper of a different nature, it is still good in the hands of a bona fide purchaser.[13] The courts have decided those cases affording protection the bona fide purchaser under the well established rule that when one of two innocent parties must suffer by the act of a third, he who by his act has enabled such third person to cause the loss must sustain it.[14] As to deeds, however, the authorities seem in accord on the proposition that if a grantor, who cannot read, signs a deed under the impression that it is a document of a different nature, the deed is absolutely void, even in the hands of a bona fide purchaser,[15] and the above stated rule cannot be invoked in his favor. But on principle, why shouldn't this rule be applicable to situations covered by the principal case, for the grantor has affixed his signature, and by this means has enabled the grantee to mislead the bona fide purchaser? Moreover it is certainly far simpler for a grantor before signing to ascertain the character of the instrument, than for a purchaser to inquire of every preceding grantor as to the validity of the deeds on record.[16]

There seems to be a decided tendency to enlarge upon the doctrine of bona fide purchaser where bills and notes are concerned. The Negotiable Instruments Law, changing the common law and now in force in about forty-six states, provides that one who has

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[9] 138 Am. St. Rep. 810 note.

[10] Hawkins v. Hawkins (1875), 50 Cal. 558; Spurgin v. Traub (1872), 65 Ill. 170; Roach v. Karr (1877), 18 Kan. 529, 26 Am. Rep. 788; 138 Am. St. Rep. 810 and note.

[11] Williams v. Hamilton (1898), 104 Iowa 423, 73 N. W. 1029, 65 Am. St. Rep. 475; Schuylkill County v. Copley (1871), 67 Pa. St. 386, 5 Am. Rep. 441.

[12] 11 Am. St. Rep. 319 note; Ward v. Johnson (1892), 51 Minn. 480, 53 N. W. 766, 38 Am. St. Rep. 515.

[13] Supra, n. 12.

[14] First National Bank of Parkersburg v. Johns (1883), 22 W. Va. 520, 46 Am. Rep. 506; Tower v. Whip (1903), 53 W. Va. 158, 44 S. E. 179, 63 L. R. A. 937; See also 3 R. C. L. Bills and Notes, § 218.

[15] McArthur v. Johnson (1867), 61 N. C. 317, 93 Am. Dec. 593 note; 8 R. C. L., Deeds, p. 1030 et seq.; 10 R. C. L., Estoppel, p. 676, § 3; see also supra, n. 3.

[16] See dissenting opinion, Bartlett, J. in Marden v. Dorothy, supra, n. 3.

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signed a negotiable instrument complete on its face is liable thereon to a holder in due course although it was never delivered by him, but lost or stolen from him.[17] The most marked step along this line seems to be that taken by Germany in regard to forged checks. Under that law a person who without negligence and in good faith, acquires a check on the face of which there is nothing irregular, acquires a good title, in spite of the fact that one of the indorsements was forged.[18] While no step has been taken toward enlarging upon the principle of bona fide purchase as applied to purchasers of deeds, such a step would certainly seem to make for greater security in business transactions and be in accord with sound public policy.

J. M. P.

ESCROWS: PRIOR CONTRACT NECESSARY TO CONSTITUTE ESCROW.—The case of Fitch v. Bunch,[1] a California case decided in 1866, clearly stated the rule for the first time, that to constitute a valid escrow the grantor and grantee must actually have contracted for the land sought to be conveyed; the terms must have been agreed upon and both must have assented to the instrument as a conveyance of the land, which the grantor would then have delivered and the grantee received, except for the agreement then made that it be delivered to a third person as depositary, to be kept by him until some specified condition should be performed by the grantee, and thereupon to be delivered to the grantee.

This rule has been adopted by several text writers,[2] the very language of Fitch v. Bunch usually being incorporated into the text and stated to be the general rule on the subject. The doctrine has, both by direct decisions and by dicta, been approved in other states,[3] and in 1891 the California court affirmed the rule.[4]

One eminent writer on real property has criticized the California decisions on the ground that escrow historically preceded

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[17] Norton, Bills & Notes (1914), Appendix, p. 601.
[18] See 9 Journal of Soc. of Comp. Leg. N. S. Vol. 9, p. 83.

[1] 30 Cal. 208.
[2] 1 Devlin, Deeds, § 313; 16 Cyc. 562, 564; 11 A. & E. Ency. 335; 10 R. C. L. 622; 3 Words & Phrases, 2464; the same principle is at the basis of an article on "Conditional Delivery of Deeds," by H. A. Bigelow, 26 Harvard Law Review, 565.
[3] Davis v. Brigham (1910), 56 Ore. 41, 107 Pac. 961, Ann. Cas. 1912 B, 1344 and note; Clark v. Campbell (1901), 23 Utah 569, 65 Pac. 496, 54 L. R. A. 508; Campbell v. Thomas (1877), 42 Wis. 437, 24 Am. Rep. 427; Seifert v. Lanz (1914), 29 N. D. 139, 150 N. W. 568; Popp v. Swanke (1887), 68 Wis. 364, 31 N. W. 916; Nichols v. Oppermann (1893), 6 Wash. 618, 34 Pac. 162; Hoig v. Adrian College (1876), 83 Ill. 267; Stanton v. Miller (1874), 58 N. Y. 192; Cooper v. Marek (Texas, 1914), 166 S. W. 58; Cagger v. Lansing (1870), 43 N. Y. 550, 552.
[4] Miller v. Sears (1891), 91 Cal. 282, 27 Pac. 589.

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contract.[5] There is no doubt but that escrow existed before the contract relation developed, but considering the changes wrought in every field of the law by the development of law,[6] it would seem that to deny that contract could have the same influence on escrow would be to deny the power of the common law to expand.

The true escrow must be distinguished, however, from a delivery to take effect on the death of the grantor or some other event equally certain to happen. To constitute an escrow, something must be performed by the grantee before title can pass, and when done, title then passes.[7] In the case of delivery to take effect on a future event certain, which is not a real escrow though called one by many cases, there is nothing to be done by the grantee except to await the happening of the event certain. The title, nevertheless, passes immediately.[8] The two classes of cases are quite different in character and different rules apply; it is to the former only that the doctrine of Fitch v. Bunch is applicable.

Most of the cases declare the depositary to be the agent of both parties.[9] To constitute this relation, it is necessary that some contract exist authorizing the agent to hold for both parties. Where the grantee does not even know of the delivery to the depositary, it is exceedingly difficult to find any theory on which the depositary can be held to be the grantee's agent for the purpose of holding the deed until performance of the condition. Until performance, title does not pass; hence a contract is necessary to bind the grantee to perform the condition and to make the deposit irrevocable until such performance. Without such contract, it is not easy to see why the delivery would be irrevocable or how the depositary could hold as anything else than as the grantor's agent.

It does not seem strange, therefore, that courts should have declared their inability to find a single case where a true escrow has been upheld where there was not also a prior contract between

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[5] Tiffany, "Conditional Delivery of Deeds," 14 Columbia Law Review, 389, 398.

[6] See Ames, History of Assumpsit, 2 Harvard Law Review, 1, 53; for effect on pledge, see 10 Harvard Law Review, 321, 389, 11 Harvard Law Review, 18.

[7] Bosea v. Lent (1903), 44 Misc. Rep. 437, 90 N. Y. Supp. 41; Davis v. Clark (1897), 58 Kan. 100, 48 Pac. 563; Cannon v. Handley (1887), 72 Cal. 133, 13 Pac. 315.

[8] See 16 Cyc. 567; Doe v. Bennett (1837), 8 C. & P. 124; Wheelwright v. Wheelwright (1807), 2 Mass. 447; Thatcher v. St. Andrew's Church (1877), 37 Mich. 264; Bury v. Young (1893), 98 Cal. 446, 33 Pac. 338; Wittenbrock v. Cass (1895), 110 Cal. 1, 42 Pac. 300; Brown v. Westerfield (1896), 47 Neb. 399, 66 N. W. 439; Maxwell v. Harper (1909), 51 Wash. 351, 98 Pac. 756; Schurz v. Schurz (1910), 153 Iowa 187, 128 N. W. 944; Foster v. Mansfield (1842), 3 Metc. 412, 37 Am. Dec. 154; Ruiz v. Dow (1896), 113 Cal. 490, 45 Pac. 867.

[9] Thornhill v. Olson (1915), 31 N. D. 81, 153 N. W. 442; Van Valkenburg v. Allen (1910), 111 Minn. 333, 126 N. W. 1092; Gammon v. Bunnell (1900), 22 Utah 421, 64 Pac. 958; Davis v. Clark (1897), 58 Kan. 100, 48 Pac. 563.

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the parties.[10] A statement to that effect is to be found in *Holland v. McCarthy*,[11] the latest case on the subject, in which the California court in very plain terms reaffirms the principle it first enunciated fifty years ago.

E. W. D.

EVIDENCE: SUFFICIENCY OF NON-EXPERT OPINION.—The English and the early American judges did not condemn non-expert opinion in general, but only the mere opinion of the lay witness when not reënforced by facts of personal knowledge.[1] When, however, the phrase "opinion is not evidence" came to be carelessly passed along, the American courts seized upon the rule that the opinion of the lay witness was generally inadmissible, even though it was based on fact-knowledge.[2]

The severance of fact from opinion, demanded by this later American rule, is neither clear nor scientific.[3] No practicable and distinct line of demarcation can be struck between fact and opinion; the statement of simple facts, as the shape, size, or color of an object, embodies some judgment or opinion.[4] The most that can be said for an attempted distinction between fact and opinion is that the witness may be taken to state a fact when the judgment or opinion involved in that statement is so simple, usual, and instantaneous as to become a wholly unconscious inference.[5] Thus, if an ordinary witness states that he recognized a masked person in the night time by his voice or that a fire occurred three or four hours before dawn, he may be considered as stating a fact and not his opinion.[6]

In order to frame a workable rule for opinion evidence, the function of admissible opinion must be regarded. Non-expert opinion is allowed when the jury cannot otherwise be put into

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[10] Campbell v. Thomas (1877), 42 Wis. 437, 24 Am. Rep. 427.
[11] (Oct. 30, 1916), 52 Cal. Dec. 499, 160 Pac. 1069.

[1] Carter v. Boehm (1766), 3 Burr. 1905, 97 Eng. Rep. R. 1162; Harrison v. Rowan (1820), 3 Wash. C. C. 580, 11 Fed. Cas. 658; Seibles v. Blackwell (1840), 1 McMull. 56; Wigmore, Evidence, § 1917.

[2] Albatross v. Wayne (1847), 16 Ohio, 513; Evans Ditch Co. v. Lakeside Ditch Co. (1910), 13 Cal. App. 119, 108 Pac. 1027; Cal. Code Civ. Proc., § 1845; Jones, Evidence (3d ed.), § 359.

[3] Kelley v. Richardson (1888), 69 Mich. 430, 37 N. W. 514; Hardy v. Merrill (1875), 56 N. H. 227, 22 Am. Rep. 441; Chamberlayne, Evidence (1912), § 1801; Wigmore, Evidence (1904), § 1919.

[4] Healy v. Visalia etc. Ry. (1894), 101 Cal. 585, 36 Pac. 125. "In almost every act of our perceiving faculties observation and inference are intimately blended. What we are said to observe is usually a compound result, of which one-tenth may be observation and the remaining nine-tenths inference." 2 Mill, Logic (3d ed.), p. 178.

[5] Thayer, Cas. on Evid. (1st ed.), p. 672, n.

[6] Ogden v. People (1890), 134 Ill. 599, 25 N. E. 755; Schwantes v. State (1906), 127 Wis. 160, 106 N. W. 237.

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possession of all the facts of the case.[7] The lay witness is permitted to give his opinion in regard to handwriting, insanity, identity, value, and the like, since it is based on facts of personal knowledge which cannot be completely detailed to the jury.[8] Expert opinion, on the other hand, is admitted not because of a difficulty in presenting graphically the observed facts, but because the technical significance of the facts presented cannot be grasped by the jury.[9] Thus, where the jury as men of common knowledge cannot intelligently determine the exact cause of death from the symptoms and pathological conditions testified to, the opinion of the physician that deceased died of phosphorus poisoning is evidence of the correct conclusion to be drawn from these symptoms and conditions.[10] An opinion rule, in the last analysis, appears to be nothing more than a rule of administration, necessarily demanding the use of considerable judicial discretion, directed to the admission of only the best available evidence needed by the jury in order to come to a just and correct decision.[11]

The Supreme Court in *Northern California Power Company v. Walker*[12] shows a proper understanding of the function of non-expert opinion in its holding that it was error to allow the opinion of ordinary witnesses as to the carrying capacity of two ditches, where better evidence, in the nature of physical facts and conditions, was available. In rendering this decision, the court announces an excellent rule to govern the admission of opinion evidence. This rule is that, whenever possible, data to establish a given condition or fact must be introduced in evidence, and if scientific knowledge be necessary to formulate these data into the statement of the ultimate fact to be arrived at, this may be done by the opinion of experts; but when it is not possible to present these data to the court, the opinions of ordinary witnesses become admissible as the best available evidence.

F. H. M.

LANDLORD AND TENANT: EFFECT OF PROHIBITION LAWS UPON LEASES OF PREMISES FOR LIQUOR SELLING.—In view of the grow-

[7] Miller v. State (1910), 94 Ark. 538, 128 S. W. 353; Holland v. Zollner (1894), 102 Cal. 633, 36 Pac. 930, 37 Pac. 231; Shafter Estate Co. v. Alvord (1906), 2 Cal. App. 602, 84 Pac. 279; Chamberlayne, Evidence (1912), §§ 1810, 1812, 1845; Wigmore, Evidence (1904), § 1924.

[8] San Diego Land Co. v. Neale (1888), 78 Cal. 63, 20 Pac. 372, 3 L. R. A. 83; People v. Manoogian (1904), 141 Cal. 592, 75 Pac. 177; People v. Gray (1906), 148 Cal. 507, 83 Pac. 707; People v. Gordon (1910), 13 Cal. App. 678, 110 Pac. 469; Cal. Code Civ. Proc., § 1870 subd. 9, 10; Jones, Evidence (3d ed.), § 360.

[9] Parkin v. Grayson-Owen Co. (1909), 157 Cal. 41, 106 Pac. 210; Sillix v. Armour (Kan. 1916), 160 Pac. 1021; Chamberlayne, Evidence (1912), §§ 1811, 1845, 1955, 2377; Wigmore, Evidence (1904), § 1923.

[10] People v. Bowers (1888), 2 Cal. Unrep. Cas. 878, 18 Pac. 660.

[11] Baxter v. Chico Const. Co. (Sept. 20, 1916), 23 Cal. App. Dec. 439, 160 Pac. 1084; Scheck v. Barrett Nephews & Co. (1917), 162 N. Y. Supp. 417; Weiss v. Kohlhagen (1911), 58 Ore. 144, 113 Pac. 46; Wigmore, Evidence (1904), § 1929.

[12] (Feb. 7, 1917), 53 Cal. Dec. 192, 163 Pac. 214.

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ing strength of the prohibition forces in California and elsewhere, it is interesting to notice what the courts of other jurisdictions have held with respect to the effect of subsequent prohibition laws upon the leases of premises for originally lawful saloon purposes. The word "saloon" as used in contracts and leases has now become synonymous with "barroom," "grogshop," or "dramshop,"[1] although its use does not necessarily import a place where intoxicating liquors alone are sold.[2]

It is a well recognized rule of contracts that where the performance of an executory contract which was lawful in its inception is made unlawful by subsequent enactment, the agreement is thereby dissolved.[3] This principle, however, has not been applied in cases for leases of saloons, except in two or three jurisdictions. The general rule appears to be that where there is a lease, wholly or in part, for saloon purposes, the lease is not terminated by the enactment of prohibition laws, or the refusal to issue a new license.[4] Nor is the tenant entitled to any abatement in rent because of the reduced value of the premises.[5] The reason given for the non-discharge of the tenant is usually that it is a matter of common knowledge that the liquor business may be terminated by operation of law, or by application of existing law, at any moment, and, consequently, that it is the duty of the lessee to have inserted in the lease a clause which will protect him should his business become prohibited by law during the term.[6] Emphasis is also placed upon the fact that some other use may still be made of the premises.

"Bone-dry" prohibition in the state of Washington has given rise to two very interesting cases in that state. In *The Stratford, Inc. v. Seattle Brewing and Malting Company,*[7] and its companion

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[1] 7 Words & Phrases, p. 6312.

[2] Kitson v. Ann Arbor (1873), 26 Mich. 325; State v. Mansker (1871), 36 Tex. 364; Goozen v. Phillips (1882), 49 Mich. 7, 12 N. W. 889.

[3] Ashley, Contracts, § 96; Wald's Pollock on Contracts (Williston's ed.), p. 514.

[4] O'Byrn v. Henley (1909), 161 Ala. 337, 50 So. 83; Burgett v. Loeb (1909), 43 Ind. App. 657, 88 N. E. 346; Baughman v. Portman (Ky., 1890), 14 S. W. 342; Abadie v. Berges (1889), 41 La. Ann. 281, 6 So. 529; Lawrence v. White (1909), 131 Ga. 840, 63 S. E. 631; Houston Ice & Brewing Co. v. Keenan (1905), 99 Tex. 79, 88 S. W. 197; San Antonio Brewing Ass'n v. Brents (1905), 39 Tex. Civ. App. 443, 88 S. W. 368; Hecht v. Acme Coal Co. (1911), 19 Wyo. 18, 113 Pac. 788, 117 Pac. 132; Goodrum Co. v. Potts-Thompson Liquor Co. (1910), 133 Ga. 776, 66 S. E. 1081; Shreveport Ice & Brewing Co. v. Mandel Bros. (1911), 128 La. 314, 54 So. 831.

[5] Baughman v. Portman, supra, n. 4; Teller v. Boyle (1890), 132 Pa. 56, 18 Atl. 1069; Fleming v. King (1897), 100 Ga. 449, 28 S. E. 239; Christian Moerlein Brewing Co. v. Roser (1916), 169 Ky. 198, 183 S. W. 479.

[6] Houston Ice & Brewing Co. v. Keenan, supra, n. 4; Abadie v. Berges, supra, n. 4; Miller v. Maguire (1895), 18 R. I. 770, 30 Atl. 966; Kerley v. Mayer (1895), 10 Misc. Rep. 718, 31 N. Y. Supp. 818; Hecht v. Acme Coal Co., supra, n. 4.

[7] (Wash., Dec. 29th, 1916), 162 Pac. 31.

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case *Shepard v. Sullivan*,[8] the Supreme Court refused to follow the general rule, and placed itself unequivocally with the minority, which holds that the tenant is discharged from his obligations by the law, even though he may sell other commodities, such as "soft" drinks, cigars, and tobacco.[9] In justifying this decided stand against authority the court said that to continue the lease for other purposes, when it was the intention of the parties that it was for saloon use, would be "harsh and inequitable." The court further said: "regardless of authorities to the contrary we think justice and equity are with the respondent" (tenant).

Apart from the consideration of the opinions written in the principal cases refusing to follow authority, one's view of these must be regulated by his views as to the status of sellers of intoxicants. If the burdens and hazards of the business should be borne by the person who engages in it,[10] the principal cases are wrong. If on the other hand, the liquor dealer is regarded as an unfortunate who should be treated leniently after the destruction of his business, the Washington court is correct.

If Burke v. San Francisco Breweries[11] may be taken as indicative of the law in this state, California will follow the majority. In that case, merely the refusal to renew a license was before the court, but it denied relief to the tenant, and cited with approval many of the cases which form the majority rule.

J. C. N.

RESTRAINT OF TRADE: COMMON LAW: PATENTS.—When the Supreme Court of the United States frankly overrules a former decision the question is not free from difficulty. The button-fastener case started the trouble.[1] Mr. Justice Lurton, afterwards a Justice of the Supreme Court of the United States, there decided that a patentee licensing the use of a patent for fastening buttons on shoes might make a condition that the machine should be used only with certain unpatented staples manufactured by the patentee. A defendant, furnishing staples to be used with such licensed machines, was enjoined as an infringer. This decision was followed in numerous federal cases and received some apparent sanction from the United States Supreme Court in Bement v. National

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[8] (Wash., Dec. 29th, 1916), 162 Pac. 34.

[9] Heart v. East Tennessee Brewing Co. (1908), 121 Tenn. 69, 113 S. W. 364; Hickey v. Sciutto (1908), 24 Can. L. T. 106, 10 British Columbia 187; Greil Bros. Co. v. Mabson (1912), 179 Ala. 444, 60 So. 876 (Mr. Justice Holcomb also cites Kahn v. Wilheim (1915), 118 Ark. 239, 177 S. W. 403, but in that case there was a provision for avoidance of the lease in case of a prohibition law being passed).

[10] Supra, n. 6.

[11] (1913), 21 Cal. App. 198, 131 Pac. 83.

[1] Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co. (1896), 77 Fed. 288.

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Harrow Co.[2] where a patentee in licensing the use of a patent among other provisions fixed the price at which the licensee could sell. This was held not in violation of the Sherman Act but merely an exercise of a right which the patent law should be construed to allow. Then came Bobbs-Merrill Co. v. Straus,[3] where the owner of the copyright of a book, by a printed notice under the copyright, attempted to fix the selling price in the hands of anyone to whom it might come even indirectly. This was held invalid. Shortly thereafter, in Dr. Miles Medical Co. v. Park & Sons Co.[4] there was presented an ingenious scheme whereby the proprietor of a medicine created the wholesalers and jobbers its agents and forbade them to sell at less than the fixed price. The case involved no question of copyright or patent but was an attempt to enjoin a purchaser from these jobbers who with knowledge of the price restriction was selling at a cut rate. The injunction was denied on the ground that the scheme was nothing but a poorly disguised sale with an invalid price restriction. Mr. Justice Holmes dissented. Thereafter came the case of a patent rotary mimeograph which was sold at cost on the express agreement that it should be used only with the stencilled paper, ink and other supplies made by the A. B. Dick Co. The validity of this agreement was sustained,[5] Mr. Justice Lurton (who in the Circuit Court had written the opinion in the button-fastener case and had recently been elevated to the Supreme Court), writing the opinion, Justices Holmes, McKenna and Van Devanter concurring. There were only three other Justices at the time on the bench and they dissented. Shortly thereafter came the Sanatogen case, a patented albuminoid.[6] The patentee provided that it should be sold at not less than a fixed price. It was held that a remote retailer did not infringe the patent by selling at a reduced rate. All the Judges who delivered the opinion in the Dick case dissented, so that a comment in a former number of this Review seems justified, that "the results reached would seem to be best accounted for by the difference in the personnel of the Court."[7] The previous decisions having apparently left certain loop holes, a new form of contract was devised for patented articles, which besides fixing a price restriction, reserved title in the patentee until the expiration of the patent, made the wholesaler and jobber agents of the patentee, and required them to make similar contracts with their vendees.

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[2] Bement v. National Harrow Co. (1902), 186 U. S. 70, 46 L. Ed. 1058, 22 Sup Ct. Rep. 747.

[3] Bobbs-Merrill Co. v. Straus (1908), 210 U. S. 339, 52 L. Ed. 1086, 28 Sup. Ct. Rep. 722.

[4] Dr. Miles Medical Co. v. John D. Park & Sons Co. (1911), 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. Rep. 376.

[5] Henry v. A. B. Dick Co. (1912), 224 U. S. 1, 56 L. Ed. 645, 32 Sup. Ct. Rep. 364.

[6] Bauer & Cie v. O'Donnell (1913), 229 U. S. 1, 57 L. Ed. 1041, 33 Sup. Ct. Rep. 616.

[7] 2 California Law Review, p. 81.

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In *Straus v. Victor Talking Machine Co.*[8] the Court brushes aside all such evasions and, looking to the substance, declares that it is merely an attempt to fix the price to the ultimate consumer and therefore bad. At the same time the case of *Motion Picture Patents Co. v. Universal Film Manufacturing Co.*[9] was decided and squarely overruled the A. B. Dick Case, so that it is no longer possible to license the use of a patented article with a condition that it shall not be used except with unpatented articles furnished by the seller. Justices Holmes, McKenna and Van Devanter again dissented in both cases. As Mr. Justice McReynolds concurred in the result and not in the opinion of the Motion Pictures Patent Co. case it is still possible to speculate on a different result if the personnel of the Supreme Court should change.

What are the principles that have caused these conflicting decisions? The opinion of Mr. Justice Clarke in the principal case contains a forcible and convincing argument that the right given under the patent law to make, use, and vend, does not by its language or by necessary implication include a right to fix the price or limit the use with non-patented articles which owners of unpatented property would not have. The court will look behind any scheme of licensing or of contracts or of reservation of title to see whether, in substance, the transaction is intended as a sale.[10] The dissenting opinion of Mr. Justice Holmes in the Motion Pictures Patent Co. case on the construction of the patent law is rather half-hearted. His argument seems to be that the button-fastener case had become a rule of property and that in any event a patent, being a legal monopoly and only existing for a limited period, agreements making that monopoly more effective are not within the common law prohibition of restraint of trade. The real basis of Mr. Justice Holmes' dissent, however, is his economic theory that such restrictions are not unreasonable on patented or unpatented articles, except perhaps price restrictions on articles of necessity when limited in quantity, a question not involved in any of these cases. As to this view, it may be said that it is undesirable that the ultimate user of a Victor Talking Machine, for example, who has paid the full price, should not have a title to it, should have to use certain kinds of needles only, and not be able to sell the machine, even second hand, at the price fixed for it when new. All these restrictions contained either in a lengthy agreement or on the machine would seldom be read or understood. The attempt to trace the article into the hands of the ultimate user and there keep track of it is a farce, as no company has the organization to accomplish this, nor does it desire to.

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[8] Straus v. Victor Talking Machine Co. (April 9, 1917, 37 Sup. Ct. Rep. 412.

[9] (April 9, 1917), 37 Sup. Ct. Rep. 416.

[10] Mr. Justice Lurton is apparently the only judge to make a distinction between use restrictions and price restrictions in patented articles. John D. Park & Sons Co. v. Hartman (1907), 153 Fed. 24.

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It by no means follows that because a patentee may withhold the use of the patented article entirely he may license its use with any conditions he chooses. It may be better that the public should not enjoy the article at all than that it should be used under restrictions obnoxious to public policy. It is obviously different, however, when the patentee of a machine, or indeed the owner of any article, licenses its use for manufacturing purposes to a restricted number of manufacturers for use in their business. Limitations may then be desirable and not unduly burdensome to the public. So price limitations, which are absurd when applied to the article in the hands of the ultimate consumer, may be reasonable to impose on wholesalers, jobbers, retailers, and all who sell the article as a business. The evils of predatory price cutting have been forcibly presented by Mr. Rogers.[11] The writer shows that where the watch that made the dollar famous is sold by a department store for sixty-nine cents at a loss for the purpose of attracting business, small dealers can not afford to keep the watch in stock and eventually the manufacturer loses his distributing agencies. This point was barely touched on by the Court in the Dr. Miles Medical Co. case,[12] and it would seem that there is an opportunity for further consideration of price fixing cases where the defense is set up that the article is not a necessary of life, that there is no monopoly, that the price is reasonable, and the conduct of the price cutter disastrous in its effect on business. It would be unfortunate if the Supreme Court of the United States should arbitrarily cut itself off from applying sound economic principles. The decisions of state courts sustaining reasonable price restrictions do not seem to have resulted in harm to the public.[13] Experience may later demonstrate that the economic theories of the Supreme Court are wrong and it is a dangerous thing to convert bad economics into law. The remedy may then have to be sought in a listing of prices with the Federal Trade Commission under proper regulations.[14] The application of the Sherman Act and the Clayton Act was not considered by the Court in the principal cases, although in the Motion Picture Patents Co. the patented device being in universal use might well have led to a monopoly of the moving picture business had the agreements in question been sustained.

A. M. K.

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[11] Predatory Price Cutting as Unfair Trade, *27* Harvard Law Review, 139.

[12] See note 4, supra.

[13] Grogan v. Chaffee (1909), 156 Cal. 611, 105 Pac. 745, *27* L. R. A. (N. S.) 395, 2 California Law Review, 325; Ghiradelli v. Hunsicker (1912), 164 Cal. 355, 128 Pac. 1041, 2 California Law Review, 325.

[14] A bill along these lines has been introduced in the Sixty-fifth Congress by Stephens of Nebraska. H. R. 212. The economists seem to be divided on the wisdom of this legislation. American Economic Rev. Supp., Vol. 6, p. 170 et seq., where Professor Taussig and other economists express opposing views.

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SEISIN: MEANING IN THE STATUTE OF LIMITATIONS.—The Code of Civil Procedure of California provides that "No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained unless it appear that the plaintiff . . . . was seised or possessed of the property in question, within five years before the commencement of the action."[1] The meaning of the word "seised" as distinguished from the word "possessed" is involved in *People's Water Company v. Boromeo.*[2] In this case, the defendant contended that the findings of the trial court of the plaintiff's seisin within the last five years and the defendant's adverse possession for the last twelve years were inconsistent. The California District Court of Appeal held that seisin was merely a right of possession which could be destroyed only by the ripening of the defendant's title by adverse possession through the compliance with all legal requirements. By this decision it is established that, to bring an action for the recovery of real property or the possession thereof, it must appear that the plaintiff was actually possessed of the property in question within five years before the commencement of the action, or had the right of possession during the period.

If we accept the original common law meaning of the word seisin as actual possession of the freehold, the defendant's stand is well taken. The meaning of the word, however, has changed, and is changing, with the changing of the rights of the owner against the person who dispossessed him.[3] In the time of Coke or Blackstone, when land could not be conveyed unless the grantor was in possession,[4] the defendant would have been justified in his objection; but today, when the right of entry is generally transferable either by direct statutory enactment, as in California,[5] or by judicial legislation, the original meaning of seisin as actual possession of the freehold cannot be maintained. Some courts and text-writers, however, seem reluctant to recognize that the old technical meaning of the word has gone.

In 1878 it was decided in England in Leach v. Jay[6] that a devise of "all the real estate of which I die seised" did not include land to which the testatrix was entitled, but which had been entered on some years before by another person. It was here held that seisin had not lost its distinctive meaning, and that a person who wrongfully obtains possession of the land of another gets seisin of the freehold, with a mere right of entry left to the

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[1] Cal. Code Civ. Proc., § 318.

[2] (Aug. 23, 1916), 23 Cal. App. Dec. 267.

[3] See The Seisin of Chattels, 1 Law Quarterly Review, 324; The Mystery of Seisin, 2 Law Quarterly Review, 481; The Beatitude of Seisin, 4 Law Quarterly Review, 24, 286; The Disseisin of Chattels, 3 Harvard Law Review, 23, 313, 337.

[4] Partridge v. Strange (1553), 1 Plow. 77, 88, 75 Eng. Rep. R. 123, 140. See also Campbell v. Point Street Iron Works (1879), 12 R. I. 452.

[5] Cal. Civ. Code, § 1047.

[6] L. R. 9 Ch. Div. 42.

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owner. If the word seisin as used by a woman in her will is applied by the court with technical strictness, it would seem that it should be applied in the same manner when used by the legislature.

Several text-writers[7] and courts[8] seem to have followed the meaning given in this case, and, while admitting that the original meaning of seisin as actual possession of the freehold has been changed, maintain that the word seisin means the right to the immediate possession of real property not in the adverse possession of another. The decision in Leach v. Jay has been criticised,[9] and doubt has been cast upon it by a later English case;[10] while an examination of the authorities cited by the various writers, does not bear out their stand. Coke and Blackstone, together with Leach v. Jay, seem to be the ultimate sources of their statements in the matter.

It is admitted that the defendant's plea can be supported on a technical meaning of the word seisin, but it is maintained that it is unreasonable to confine the word to such a meaning, when its legal incidents are obsolete.[11] The meaning as given the word by the present decision is a reasonable one, and has been expressed in dicta by other courts.[12] "Seisin is no doubt an interesting subject of historical study, but to treat it as having a practical bearing on the modern law of adverse possession is to keep 'with phantoms an unprofitable strife' and to add unnecessary difficulties to a subject which has sufficient difficulties of its own."[13]

S. M. A.

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[7] 1 Reeves, Real Property, pp. 379-80; Minor & Wurts, Real Property, p. 126; 1 Tiffany, Real Property, p. 33; Goodeve, Real Property (5th ed.), p. 200. See also Tiedeman, Real Property (2nd ed.), pp. 643-4; 3 Washburn, Real Property (6th ed.), p. 121.

[8] Carpenter v. Garrett (1880), 75 Va. 129; Seim v. O'Grady (1896), 42 W. Va. 77, 24 S. E. 994.

[9] Jarman, Wills (6th Eng. ed.), p. 950, note x.

[10] In Copestake v. Hoper (1908), 2 Ch. Div. 10, it was held that seisin passed by the execution and delivery of a deed, and that the seisin was in the mortgagee, and not in the mortgagor in possession, reversing Kekewich J., who, following Leach v. Jay, had held that the mortgagee like the rightful owner out of possession had but a right of entry. [1907], 1 Ch. Div. 366.

[11] Seisin still operates in its technical sense when an estate is claimed by curtesy, in those jurisdictions which will recognize that right, as in Carpenter v. Garrett, supra, n. 8.

[12] Seisin has been declared to mean ownership, Garrett v. Ramsey (1885), 26 W. Va. 345-369; other courts have stated that the execution and delivery of the deed amounted to a seisin in law, Watkins v. Nugen (1903), 118 Ga. 372, 45 S. E. 262, 263; Adams v. Barrett (1848), 5 Ga. 404, 415; Copestake v. Hoper, supra, n. 10; while still other courts have held that seisin in law, as distinguished from seisin in fact, is the right to immediate possession, Tate v. Jay (1876), 31 Ark. 576, 579; Houston v. Smith (1883), 88 N. C. 312, 313; Savage v. Savage (1890), 19 Ore. 112, 23 Pac. 890, 891; Upchurch v. Anderson (1874), 3 Baxt. (Tenn.) 410, 412; In re Prasser's Will (1909), 140 Wis. 92, 121 N. W. 643, 645.

[13] Seisin, 12 Law Quarterly Review, 239.

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TRADEMARKS AND TRADENAMES: INVENTED WORDS: EXTENT OF TRADEMARK.—The word "groceteria," as applied to a grocery store conducted by cafeteria methods, may be a trademark, according to *Groceteria Stores Company v. Tibbett.*[1] The case harmonizes with principles applied by both English and American cases on the use of invented words as trademarks. In England, by statute, invented words may be trademarks although they refer directly to the character of the article trademarked.[2] A term is not invented within this rule if it consists of a whole existing word plus a suffix,[3] but it is invented if, like "groceteria," it is a compound of parts only of two existing words.[4] In America, even in the absence of statute, the same principle prevails, and invented words may be trademarks, although their sound, through similarity with natural words from which they are derived, suggests the article trademarked.[5]

It is a familiar rule that a word which is descriptive of the article which it identifies cannot be appropriated as a technical trademark.[6] The fact that a word is foreign in origin will not justify its use if it is descriptive in its foreign meaning.[7] Thus the word "cafeteria" could not have been appropriated as a trademark, even when first introduced into America.

A term originally suitable for a trademark may become descriptive by custom. After becoming descriptive, it cannot be adopted as a trademark.[8] But if the term has become a trademark before

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[1] (Wash., Dec. 29, 1916), 162 Pac. 54.

[2] Christy v. Tipper, [1904] 1 Ch. Div. 696.

[3] Christy v. Tipper, supra, n. 2, "Absorbine" rejected.

[4] In re Aktiengesellschaft's Trademark, [1914] 2 Ch. 103, "Parlograph" accepted.

[5] Keasbey v. Brooklyn Chemical Works (1894), 142 N. Y. 467, "Bromocaffein" applied to drug; Northwestern Consol. Milling Co. v. Mauser & Cressman (1908), 162 Fed. 1004, "Ceresota" applied to Minnesota flour; Consolidated Ice Co. v. Hygeia Distilled Water Co. (1907), 151 Fed. 10, "Hygeia" applied to distilled water; Potter Drug & Chemical Corp. v. Pasfield Soap Co. (1900), 102 Fed. 490, "Cuticura" applied to soap; Sterling Remedy Co. v. Eureka Chemical and Manufacturing Co. (1897), 80 Fed. 105, "No-To-Bac" applied to cure for tobacco habit; N. K. Fairbank Co. v. Central Lard Co. (1894), 64 Fed. 133, "Cottolene" applied to cotton oil shortening; Leonard v. White's Golden Lubricator Co. (1889), 38 Fed. 922, "Valvoline" applied to lubricating oil. Probably contra, Woodcock v. Guy (1903), 33 Wash. 234, 74 Pac. 358, "Gargeline" applied to throat medicine. Possibly Cal. Civ. Code, § 991, forbidding the appropriation of parts of a designation relating to the name, quality or description of the thing or business trademarked, would establish a different rule in California.

[6] Choynski v. Cohen (1870), 39 Cal. 501, 2 Am. Rep. 476; Hamilton Shoe Co. v. Wolf Bros. (1916), 240 U. S. 251, 60 L. Ed. 629, 36 Sup Ct. Rep. 269.

[7] Burke v. Cassin (1873), 45 Cal. 467, 13 Am. Rep. 204; Italian Swiss Colony v. Italian Vineyard Co. (1910), 158 Cal. 252, 110 Pac. 913, 32 L. R. A. (N. S.), 439; Thermogene Co. v. Thermozine Co. (1916), 234 Fed. 69; Dadirrian v. Yacubian (1896), 72 Fed. 1010.

[8] Albers Bros. Milling Co. v. Acme Mills Co. (1909), 171 Fed. 989; Extract of Meat Co. v. Walker (1902), 115 Fed. 822.

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custom makes it descriptive, rights to it will not be impaired.[9] Thus if "groceterias" should become as common as cafeterias, no trademark could thereafter be acquired in the word, but trademarks acquired, like that in the principal case before the term became descriptive, would remain effective.

In the principal case, the trademark was printed on the wrappers in which the goods were sold. A trademark must be closely associated with the goods which it identifies. Mere use in advertisements is not enough.[10] The principal case follows the rule that printing the trademark on wrappers is sufficient.[11]

The court in the principal case thought it necessary to find that the market of the claimant overlapped the market of the infringer. In this respect the court failed to observe the distinction, pointed out earlier in the case, between a technical trademark, protected by the common law on the principle of ownership, and a mere tradename, protected in equity on the principle of unfair competition. Cases defining this distinction are legion.[12] If the principle of trademark applies, the right to exclusive use is co-extensive with the jurisdiction under which the right is claimed, and it is immaterial that the market of the claimant has not extended to the locality where the infringement occurs.[13] Recent federal cases, however, make an important exception to this rule, deciding that if the holder of a trademark leaves a market untouched for a long period, he may be estopped from asserting his trademark in that locality as against an infringer acting in good faith.[14] If the principle of tradename applies, the right to protection against unfair competition is obviously only co-extensive with the territory of the party claiming the tradename.[15]

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[9] Selchow v. Baker (1883), 93 N. Y. 59, 45 Am. Rep. 169; Lawrence Mfg. Co. v. Tennessee Mfg. Co. (1890), 138 U. S. 537, 34 L. Ed. 997, 4 Sup. Ct. Rep. 396; Celluloid Mfg. Co. v. Read (1891), 47 Fed. 712.

[10] Hazelton Boiler Co. v. Hazelton Tripod Boiler Co. (1892), 142 Ill. 494, 30 N. E. 339.

[11] Jay v. Ladler (1888), L. R. 40 Ch. Div. 649, 60 L. T. Rep. 27.

[12] Modesto Creamery Co. v. Stanislaus Co. (1914), 168 Cal. 289, 142 Pac. 845; Eastern Outfitting Co. v. Manheim (1910), 59 Wash. 428, 110 Pac. 23, 35 L. R. A. (N. S.), 251; Esselstyn v. Holmes (1911), 42 Mont. 507, 114 Pac. 118; Sartor v. Schaden (1904), 125 Iowa, 696, 101 N. W. 511; Elgin National Watch Co. v. Illinois Watch Co. (1901), 179 U. S. 665, 45 L. Ed. 365, 21 Sup. Ct. Rep. 270.

[13] Derringer v. Plate (1865), 29 Cal. 292, 87 Am. Dec. 170; Sartor v. Schaden, supra, n. 12; United Drug Co. v. Rectanus (1913), 206 Fed. 570; Consolidated Ice Co. v. Hygeia Distilled Water Co., supra, n. 5; Morrison v. Case (1872), 17 Fed. Cas. 9,845.

[14] Hanover Milling Co. v. Metcalf (1916), 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. Rep. 357, Ann. Cas. 1916 D, 136; Gaines & Co. v. Rock Spring Distilling Co. (1915), 226 Fed. 531; Carrol & Son Co. v. McIlvaine (1909), 171 Fed. 125.

[15] Eastern Outfitting Co. v. Manheim, supra, n. 12; Sartor v. Schaden, Supra, n. 12; Kaufman v. Kaufman (1916), 223 Mass. 104, 111 N. E. 691; Ball v. Broadway Bazaar (1907), 121 App. Div. 546, 106 N. Y. Supp. 249.

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British Emergency Legislation During the Present War[1]

IF THERE were any need of proving that England did not provoke or desire the present war, no proof could be more conclusive than the general state of unpreparedness when the war was actually declared. The number of measures which had to be taken immediately at the outbreak of the war, though large in itself, is small as compared with the additions which experience proved to be necessary in order that the war might be prosecuted to a successful finish. The need for new measures arose, first, as the government became aware of the insufficiency of the existing rules; and secondly, as modern warfare brought with it the necessity of providing for new emergencies.

Under the old common law[2] there had been at the outbreak of the war, certain rules which gave the King, or, in other words, the government, a certain amount of power. Here might be mentioned the right to require in case of sudden invasion or danger, the personal service of every man capable of bearing arms, the right to regulate intercourse between British and foreign subjects, to exclude or place restrictions upon aliens, to restrain subjects from leaving the country or to recall them from abroad, to place an embargo upon shipping, to make proclamations to a certain extent for the trial of civilians by court-martial, to enter private land in order to erect fortifications, etc. Statutes passed during the nineteenth century had also con-

[1] A lecture delivered at the University of California on April 20, 1917. Some later developments are referred to in the foot-notes.

[2] Cf. Halsbury, Laws of England, vi. p. 444, s. v. Constitutional Law.

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ferred upon the government compulsory powers. But, at the outbreak of the present war, it proved necessary to build up a practically new system of emergency legislation. That was done first of all by statutes.[3] Statutes, however, could only confer general powers, and the working out of details was left to proclamations or Orders in Council made by the King, (corresponding to the proclamations of the President of the United States), or even to orders of certain other authorities, such as departments of government, e. g. the Board of Trade, the Home Secretary, the Secretary for Scotland, or the "Competent Military Authority" under the Defence of the Realm Regulations.

It might be useful to discuss the statutes and other rules enacted during the war under the following heads: (a) Organization of Forces. (b) Supplies for the Forces. (c) Prevention of Demoralization and Maintenance of Order. (d) Protection of the Country. (e) Weakening of the Economic Power of the Enemy. (f) Strengthening of the Economic Power of the Country.

Of course only the most important and characteristic enactments can be referred to here and financial measures will have to be left out almost entirely.

ORGANIZATION OF THE FORCES.

The first steps to be taken were the making of decrees calling out the Reserves and otherwise providing for the use of all existing forces of the Crown. The original British army, as it existed at the outbreak of the war, proved very small indeed in comparison with the forces which have since been organized and sent to the front. Apart from the voluntary recruits, it was found necessary in 1915 to take stock of the available resources of manpower, in order to know both how many men were still available in the case of the passing of compulsory service acts, and how many men and women, trained for any kind of work other than military work and willing to serve the government in the present emergency, could be had in case of necessity. Consequently, the National Registration Act, enacted on July 15, 1915, provided for

[3] These statutes can be found in the general collections of British statutes (the official collection "Public General Acts," or "Law Reports: The Public General statutes," or "Law Journal Reports: The Public General Acts", or "Law Times: Statutes"). A collection, under the title Manual of Emergency Legislation, was published in September, 1914, with, so far as the writer knows, four supplements (to August 31, 1915): it includes statutes, proclamations and other orders. A collection of Defence of the Realm Acts and Regulations has also been published by authority.

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the establishment of a register of all persons, male and female, between the ages of fifteen and sixty-five, except those already serving in the army or navy. Every person resident in Great Britain (the Act does not apply to Ireland) was required to fill up a form stating his or her name, residence, age, whether single or married, the number of dependents, occupation, if any, and the employer's business, nationality, whether the work done by the person in question was for or under a government department, whether the person was skilled in, and able and willing to perform, any work other than the work at which he or she was at the time employed. It was also provided that any change of address of every person so registered should be communicated to the proper official, and that newcomers were to register at once. Whether the National Registration Act has worked satisfactorily or not has been a somewhat debated question. It has certainly supplied the government with a large amount of important information.

When there came need of an army greater than that which could be furnished by voluntary recruiting, compulsory military service had to be introduced. The first Military Service Act, 1916, which received the royal assent on January 27, 1916, provided that every male British citizen who on August 15, 1915, was ordinarily resident in Great Britain (the Act did not apply to Ireland) and had attained the age of eighteen years, and had not attained the age of forty-one, and on November 2, 1915, was unmarried or was a widower without any child dependent on him, should, unless he was within the exceptions, or had attained the age of forty-one before the appointed date, be deemed as from the appointed date to have been duly enlisted in the regular forces for general service with the colors, or in the Reserve for the period of the war, and to have been forthwith transferred to the Reserve. The burden of proof that the act did not apply to any individual rested on him.

There were established local tribunals, appeal tribunals, and a central tribunal, for granting certificates of exemption on the ground that it was expedient in the national interest that the applicant should continue his present work, or take up some special work, or continue his education, or on the ground that serious hardship would ensue for the man, owing to his exceptional financial or business obligations, or domestic position, or on the ground of ill health or infirmity, or of a conscientious objec-

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tion to the undertaking of combatant service. The certificates might be absolute, conditional or temporary; they might also be granted by government departments to men employed by them or for them; certificates are always reviewable and revocable.

The first Military Service Act provoked a certain amount of confusion because the tribunals in different parts of the country, undoubtedly animated by very patriotic motives, could not be expected to interpret the quite new rules and regulations in the same way, and, consequently, in some places exemptions would be granted under circumstances under which in other places they had been refused. The government issued a great number of supplementary rules intended to simplify proceedings and to remove misunderstandings.

Very largely under the pressure of public opinion, another Military Service Act, the Military Service Act, 1916, (Session 2), extended the principle of the first Act from British subjects who had not been married at a certain date to all male British subjects who at any time since August 14, 1915, had been, or for the time being were, ordinarily resident in Great Britain (the Act does not apply to Ireland), and had not attained the age of forty-one, unless they were within the exceptions. It was also provided that the Reserve and Territorial forces should remain with the colors until the end of the war.

In order to review the exemptions which might appear no longer justifiable, owing to the progress of the war, the more pressing need of men and the necessity of reducing the standard of requirements, there was then passed the Military Service (Review of Exceptions) Act, 1917. It applies to men who had been discharged or rejected or had been declared unfit for foreign service, and, with certain exceptions, requires such men to present themselves upon summons for re-examination.

The Military Service Acts apply, of course, only to men of what is considered military age. Men above or below that age, or men prevented by slight physical defects or by the nature of their employment at home from joining the army and going to the front, have practically since the beginning of the war been keen to help in the release of troops for service at the front and also to help in the organization of defence troops for the very remote, but not quite impossible, event of the invasion by the enemy. The volunteer corps had already proved efficient organizations when the Volunteer Act, 1916 (enacted on December 22, 1916) pro-

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vided that agreements entered into by members of volunteer corps to attend drills or undergo training or undertake military duties should be enforced by military courts and that such members during the training, drill, or performance of the military duties should be subject to military law. This Act is intended to organize the volunteers on a military basis, give them official recognition and enable the government to count upon their assistance in cases of need.

The creation of an enormous new army made very acute the problems of separation allowances for the wives and children of soldiers, whether volunteers or conscripts, of pensions for the dependents of men killed or permanently disabled in the war, and of pensions for disabled men themselves. Separation allowances have been paid very liberally. The underlying principle was that the government would pay wives and children of the soldiers several times the sum which the soldier himself was to give out of his pay. The rules as to separation allowances and pensions have been changed several times, and in addition there was passed in the course of 1915 the Naval and Military War Pensions, etc., Act, 1915. Under that act a committee was formed, called the Statutory Committee of the Royal Patriotic Fund Corporation. Subordinated to that Committee were local committees. The object of the committees was to decide questions of fact as to war pensions, and to make supplementary grants where grants out of public funds would prove inadequate. Such grants were to include the supplementing of pensions, separation allowances and other government grants. The committees were also to make grants or separation allowances where no grants or separation allowances from the government were payable at all, and out of their funds they were to make advances on pensions, grants, or separation allowances due at a later date from the government. The committees were to make provisions for disabled officers and men after they had left the service, including provisions for their health, training and employment. The local committees were to help the central committee and to exercise a certain amount of discretion in distributing funds. An important function seems to have been to collect funds from the public in order to strengthen the financial power of the Committee. In the course of 1916 a special ministry, the Ministry of Pensions, was created in order to regulate on a uniform basis the payment of pensions, etc.[4]

[4] The Statutory Committee, which was at first subordinated to the Ministry of Pensions, has now ceased to exist.

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The Courts (Emergency Powers) (Amendment) Act, 1916, enacted on May 17, 1916, was meant to protect the financial affairs of officers and men of the British forces. It was realized that, while they were fighting, it was not fair to let their debts be collected without regard to the fact that such collection might result in the ruin of the officers and men and their families. Under the Act no execution or other enforcement of judgment can be had against an officer or man of the British forces for a sum of money due and payable in pursuance of a contract, whether made before or after the outbreak of the war, except by special permission of a competent court, which has absolute discretion, after considering all the circumstances of the case and the position of the parties, to stay the execution. No distress may be levied, no right of re-entry, foreclosure, no other means of enforcing payment or recovery may be used against an officer or man without a similar application to a competent court which has the same discretion. Likewise a bankruptcy petition can be proceeded upon only upon an application which is again decided upon by the court according to its absolute discretion.[5]

On the other hand, any officer or man who is tenant of any premises under a tenancy from year to year, or for any longer period, may apply to the proper court for leave to determine the tenancy and the court may, in its absolute discretion, again considering all the circumstances of the case and the position of all the parties, by order authorize the applicant to determine the tenancy by such notice and upon such conditions as the court thinks fit.

Supplies for the Forces.

One of the first steps taken by the government at the outbreak of the war (August 4, 1914), was the assumption of control over all the railroads of Great Britain. That step was obviously necessary, and because of strikes and other difficulties, it had to be followed by the taking over of coal mines two years later, in November, 1916. In December, 1916, shipping was placed under a new minister, the Shipping Controller, who has the function of monopolizing the control of shipping.

[5] This part of the Act corresponds with the Courts (Emergency Powers) Act, 1914, which is mentioned below. But in the case of officers and men of the forces there is no need to prove that the unfavorable position has arisen by reason of circumstances attributable directly or indirectly to the present war. The following part, which deals with determination of tenancy, has no application at all in the case of civilian tenants.

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The organization of the huge armies rested for the first two years in the hands of Lord Kitchener, but it was found early in the war that the supply of munitions had to be much greater than was originally anticipated, and consequently it was considered necessary to establish a special Ministry of Munitions, at the head of which stood for a time the greatest organizing genius of contemporary Britain, Mr. Lloyd George. The Ministry of Munitions was created by an act dated June 9, 1915. Its existence is to cease, at the latest, twelve months after the conclusion of the present war. Very soon after the creation of the Ministry, an act called the Munitions of War Act, 1915, was passed in order to facilitate more efficient organization of the munition supply. Under that act it was provided that no lock-out or strike could take place as a result of disputes as to wages, hours of work, or as to terms or conditions of, or affecting, employment on the manufacture or repair of arms, munitions, ships, vehicles, aircraft or other articles required for use in war, or of metals, machines or tools required for that manufacture, or on any other work, if the King by proclamation had made the Act applicable because in the King's opinion the dispute was directly or indirectly prejudicial to the manufacture, transportation, or supply of munitions of war. It was provided that such disputes were to be reported to an arbitrator or court of arbitrators agreed upon by the parties or fixed by the Board of Trade, or both. Strikes or lock-outs would become lawful only if such dispute were not settled by award within twenty-one days after reference to the arbitrators.

By the same Act the Minister of Munitions was authorized to declare that an establishment in which munitions were manufactured was a "controlled establishment," and in such cases he was authorized to limit the profits, suspend rules as to limitations of output, and make other regulations; the owner of the establishment would be deemed to have consented to such rules. By "munitions" are meant practically all articles necessary for the successful prosecution of the war.

Munitions tribunals were established, composed of chairman appointed by the Minister of Munitions and of men chosen by the Minister from panels representing in equal numbers the employers and employees. The tribunals were put in charge of "all offences and matters" under the Act.

Under the emergency legislation the Government has come to

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be, directly or indirectly, an employer of labor on an unprecedented scale. Both workmen and employers have been put under much restraint. The Trade Unions have indeed agreed voluntarily to have many of their rules suspended, but on the other hand it was realized that the new conditions, the entry into the factories of vast hosts of untrained and unorganized workmen, necessitated state rules under which the health and the general position of the workmen could be cared for properly. Many measures have had to be taken to insure that the workmen will be properly paid, properly fed, and otherwise cared for. Examples of such measures will be found in the Police, Factories, etc. (Miscellaneous Provisions) Act, 1916, which enables the Home Secretary to make far-reaching rules as to all these subjects and which makes the application of such rules sometimes dependent upon a request of the workers themselves or of a qualified majority of them.

The increasing size of the army, the heavy casualties calling for new men to fill the gaps, the munition work established on an unprecedented scale, the necessity of building up British agriculture to provide an increased food supply, not only because of the submarine danger, but also because the existing tonnage is needed for transportation of troops and munitions—all this resulted in a necessity for the government to use all available hands. Everybody could help—men and women, old and young. Many women, and many men above military age or unfit for military service, offered their services to the government; the question was how to use their hands or their brains in the best way. "For the purpose of making the best use of all persons, whether men or women, able to work in any industry, occupation, or service," the Ministry of National Service was created by the Ministry of National Service Act, 1917. The Act provided, however, that no Order in Council or regulation should authorize the compulsory employment or transfer of any person in or to any industry, occupation, or service, or should impose any penalty for any breach of a voluntary agreement made by any person with the Minister of National Service, whose official title is Director-General of National Service.[6]

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[6] The Billeting of Civilians Act, 1917, (enacted on May 24, 1917) is an interesting illustration of the way in which workers far away from the battlefield have to be taken care of in the interest of modern warfare. A central Billeting Board (on which two seats are reserved

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MAINTENANCE OF ORDER AND PREVENTION OF DEMORALIZATION.

It is obvious that the strain of the war must have resulted in many difficulties, the work of the courts of law among other things. One of the chief complaints has been to the effect that while every hand was needed for war service, many citizens had had to spend their time on juries, the work of which could be accomplished by fewer men. Without changing the general rule as to petty juries,[7] the Grand Juries (Suspension) Act, 1917, directs that no grand juries shall henceforth be summoned, but that where a person has been committed for trial or where the consent or direction in writing of the High Court of Justice or of the Attorney-General or Solicitor-General for the presentment of an indictment has been given, an indictment may be presented without having been found by a grand jury. This act does not extend to Scotland or Ireland, and is to remain in force only during the continuance of the present war and six months after the termination of the war.[8]

It was found necessary to provide a larger number of constables to supervise certain buildings of public importance, and, apart from that, many policemen had volunteered for service with the colors and had to be replaced. Under the Statute of 1831, special constables (civilians who offered their services for police work during certain hours of the day or night), were used to fill the need of policemen. Men above military age or men

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for women) is to take charge of the question of billeting civilians, wherever any Government departments certify that the carrying out of the work is of national importance for the purposes of the present war and necessitates provision of accommodation in any locality for the persons employed on that work (which may be munitions work or any other kind of work). The Act prescribes in detail how the Board shall form local committees and make regulations for them, it makes it compulsory for the occupier of any premises within a locality where the Act is in operation to give the local committee any information reasonably required of him, to provide (if required to do so under the Act) billets, attendance, and meals or food for the persons billeted; the Act also lays down rules as to the settlement of disputes, as to the behavior of persons billeted, and as to compensation and other payments due to the occupier of the premises. The Act, furthermore, contains rules as to cases in which billeting can not take place without the consent of the occupier of the premises. The Act does not extend to Ireland.

[7] As to the possibility of trying persons by court-martial for alleged offences against the Defence of the Realm Acts and Regulations, see below.

[8] The Coroners (Emergency Provisions) Act, 1917, placed on the Statute Book in May, 1917, lowers the number of persons who are summoned to serve as jurors at a coroner's inquest, from between twelve and twenty-three to between seven and eleven.

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otherwise prevented from serving with the colors offered their services in large numbers; the Special Constables Act, 1914, together with Orders in Council relating to special constables, organized this force which appears to have worked very satisfactorily.

One of the great difficulties which the government had to face since the early stages of the war was the question of liquor traffic. Wives of soldiers, especially of those coming from the poorest classes of society, found themselves in regular receipt of sums of money larger than had ever been earned by their husbands in peace time. It was found that they, and also the munition workers, who are paid very liberally, would sometimes spend their pay, at least in part, on liquor, with the result not only that their pay was wasted, but that their working ability was weakened. Under the Defence of the Realm (Amendment No. 3), Act, 1915, Orders in Council were made establishing the Central Control Board (Liquor Traffic). The Board was invested with the power of closing licensed premises and clubs, of regulating the hours during which such premises or clubs might be open at all, or might be open for the sale or supply of intoxicants, of prohibiting such sale or supply on any premises or in clubs, of imposing restrictions or conditions, and generally of regulating the introduction and transport of intoxicants. The Board was also authorized to monopolize the sale and supply of intoxicants, to establish refreshment rules, to acquire premises by compulsion. The Board issued regulations for each of twelve specified areas, and each contravention of the regulations was to be punished with imprisonment with hard labor for six months, and a fine of one hundred pounds.

Steps have been taken to prevent the disorganization which usually results from political struggles. With millions of voters fighting "somewhere in France," with the local party organizations either asleep or hardly able to undertake political fights without diverting attention from some important war work, parliamentary elections so far as possible, even local elections, have had to be postponed. The revision of the parliamentary register was at first postponed, and afterwards, in 1916, not indeed, ordered, but allowed. The life of Parliament has been repeatedly prolonged (each time for seven or eight months), by statutes without which the present Parliament would have termi-

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nated some fifteen months ago,[9] and which have provided similarly for the postponement of local elections (Elections and Registration Act, 1915; Parliament and Registration Act, 1916; Parliament and Local Elections Act, 1916; Parliament and Local Elections Act, 1917).

During the war numerous changes have occurred in the personnel of the government, many ministers having either resigned or changed departments. As nearly all ministers who are members of the House of Commons, as soon as they accept a new office of profit under the Crown, automatically lose their seats, several acts were passed (Re-election of Ministers Act, 1915; Re-election of Ministers Act, 1916; Re-election of Ministers (No. 2) Act, 1916), temporarily suspending the operation of this rule, so as to enable the ministers to retain their seats and avoid the necessity of a by-election.

The British public has been very generous whenever appeals were made to it to contribute funds or gifts in kind, either for British or for Allied charitable purposes. As it appeared that the generosity of the public was sometimes taken advantage of by imposters, the War Charities Act, 1916, laid down rules as to the registration of war charities and their supervision.

Protection of the Country.

At the very outbreak of the war a statute called Aliens Restriction Act, 1914, authorized the King to make regulations by Orders in Council for restricting the landing, embarkation, or residence of aliens in certain areas, or the movements generally of all aliens or classes of aliens, for registration of aliens and for other measures necessary for the exercise of what might be called aliens' police. Under that act Orders in Council were first made requiring the registration of all alien enemies, that is, subjects of enemy states. Alien enemies were forbidden to travel beyond five miles from their registered address without permit. They were required to notify the police whenever they were about to change their address. Later the duty of registration was extended to all persons whether aliens or not, coming to boarding-houses, lodging houses, hotels and inns of any description, but such registration, apart from the case of alien enemies who had also to register with the police, meant only the duty of filling up certain forms which

[9] The spring of 1916.

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were to be kept by the landlord. The duty of registration with the police was extended, by request of the Belgian government, to Belgian refugees, in order to prevent abuses of English hospitality by enemy agents. Finally, rules were made requiring all aliens to register with the police of the district in which they resided (apart from registering at the boarding-houses, hotels, etc.), and to carry identity books issued by the police, containing a photograph and personal description of the alien, and statements as to nationality of his wife and parents, as to any near relations serving with or against the allies, and other details.

From the very first, there was specified a number of "prohibited areas," in which no aliens could reside without registering with the police, while alien enemies could reside there only by special permission of the local police, granted in exceptional cases. Alien enemies were forbidden to have in their possession firearms, or other weapons, ammunition, explosives, petroleum and other inflammable liquids in quantities exceeding three gallons, any signalling apparatus, motor cars, motor-cycles, motor-boats, yachts, air-craft, telephones, cameras, military or naval maps or handbooks, cipher codes, etc. Restrictions were placed on the circulation among alien enemies of newspapers in enemy language, and also on the carrying on of any banking business by alien enemies.

It was the policy of the government at first not to intern alien enemies excepting when they were either actually suspected, or destitute. Later on, about the middle of 1915, general internment was decided upon. Internment was to extend only to males of military age; all other alien enemies of both sexes were to be deported. But Advisory Committees, presided over by judges of the High Court, were appointed to make recommendations to the Home Secretary upon applications for exemption. The policy of the Advisory Committees has been to grant exemptions to people who could prove that their remaining at liberty in the country was in the public interest, for instance, because of the character of the work in which they were engaged, or else because they were proved to be heartily in favor of the Allies. The Committees also usually recommended for exemption men who were supporting British-born wives and large families and who could establish their claims to be perfectly harmless. But, above all other exemptions, it has been the policy of the government to grant exemptions to men who, while technically the subjects of the enemy, were, by reason of their nationality, con-

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sidered friendly and not enemy aliens. To this category belong the Bohemians, Slovenes, Serbs and Croats who are technically subjects of Austria or Hungary, Poles who are technically subjects of Austria or Germany, Alsatians, Danes from Schleswig, and subjects of Turkey such as Armenians and Greeks. In most of these cases the government favored the establishment of committees, e. g., the Polish Information Committee and the Southern Slav Committee, which were to report to the Advisory Committee whether the claim of any applicant to be a member of the given nation was justified or not. Thousands of exemptions were granted on the ground of such reports.

Another important group of acts is the Defence of the Realm Acts. The rules, enacted in the early part of the war, were consolidated in the Defence of the Realm (Consolidation) Act, 1914, under which the King in council was empowered to make regulations during the present war for securing the public safety and the defense of the realm. By such regulations he was originally empowered to authorize the trial by court-martial, or in the case of minor offenses, by courts of summary jurisdiction, of persons committing offences against the Defence of the Realm Regulations. The trial by court-martial was to proceed as if the defendant were a person subject to military law who had, on active service, committed a military offense. The death penalty was threatened when it would be proved that the offence had been committed with the intention of assisting the enemy. The provision as to the trial of British civilians by court-martial aroused opposition in the House of Lords, especially on the part of a prominent judge, Lord Parmoor. Finally, the government introduced a bill which was passed as the Defence of the Realm (Amendment) Act, 1915. By that Act, British subjects who were civilians were given the right to claim a trial by civil court and a jury. The courts were given the power of excluding the public from any part of the hearing whenever asked by the prosecution in the interests of national safety. In the event of invasion or other special military emergency arising out of the present war, the King was empowered to suspend by proclamation the right of civilians to demand a civil court and jury, either generally or in any specific area. It was under this provision that so-called martial law was established in Ireland after the events of Easter week, 1916. The Defence of the Realm Acts also authorized the Admiralty and War Council to require that there should be placed

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at their disposal the whole or any part of the output of any factory or workshop in which arms, ammunition or warlike stores or equipment, or any articles required for the production thereof were manufactured. The Admiralty and War Council were even authorized to take possession of, and use for naval or military services, any such factory or workshop, or any plant thereof.

Under the Defence of the Realm Acts, regulations have been issued, the main body of which is represented by the Defence of the Realm (Consolidation) Regulations, 1915. The underlying principle was that the ordinary avocations of life and the enjoyment of property would be interfered with as little as might be permitted by the exigencies of the measures required to be taken for securing the public safety and the defence of the realm. Ordinary civil cases were to be dealt with by the civil tribunals in the ordinary courts of law.

Competent naval or military authorities were authorized for securing the public safety or the defence of the realm, to take possession of movable or immovable property of any description, to use land for training, to stop up roads, to require the removal of movables from any areas, to take possession or requisition the output of factories manufacturing arms, munitions, etc., to require the extinguishment of lights, to require inhabitants to remain indoors and to remove suspects from specified areas. It was forbidden for anyone without lawful authority to collect, record, publish or communicate, or attempt to elicit any information with respect to the movement, numbers, description, condition, or disposition of any of the British or allied forces, ships, or war materials, or with respect to the plans or conduct or supposed plans or conduct of any naval or military operations by such forces or ships, or with respect to any works or measures undertaken for or connected with or intended for the fortification or defence of any place, or any other information intended to be communicated to the enemy, or of such a nature as was calculated to be, or might be, directly or indirectly useful to the enemy. It was prohibited to have in one's possession, or to carry, or to liberate any carrier or homing pigeons, to possess a wireless telegraphic apparatus, or to buy, or sell, or control one, or to transmit otherwise than through the post, or receive or to have in one's possession for such transmission or conveyance, any letter or written message to or from subjects of enemy countries, or persons resident in enemy countries. It was prohibited for anyone,

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without lawful authority, to be in possession of any searchlight, semaphore or other apparatus intended for signalling, whether visual or otherwise, or to display, erect, or use any signal, or display lights, or use fireworks which might serve as a signal, guide, or landmark. It was likewise prohibited to spread false reports, or make false statements, or spread any reports or make any statements, whether by word or mouth, or in writing or in any newspaper, periodical, book, circular or other printed publications, likely to cause disaffection to the King, or to interfere with the success of the forces by land or by sea, or to prejudice the King's relations with foreign powers, or spread reports, or make statements likely to prejudice the recruiting, training, or discipline, or administration of any of the forces. Other rules relate to the possession or carrying of arms, inflammable articles, injury to railroads or military works, etc. Provision was likewise made against supplying intoxicants, including sedatives, narcotics or stimulants, to members of armed forces for the purpose of eliciting information to be communicated to the enemy or for any purpose calculated to assist the enemy, or with the intent of making members of the armed forces drunk, or less capable of the efficient discharge of their duties.

Further regulations (e. g. June 10, 1915, July 6, 1915, and July 28, 1915) have given the Home Secretary and the Secretary for Scotland powers for regulating lighting. On the recommendation of a competent naval or military authority, or an advisory committee, the Secretary was empowered to intern, or prohibit to leave an area, or to enter an area, or otherwise to subject to restrictions, any person (whether British subject or otherwise) in view of his hostile origin or associations, whenever it might be expedient for securing the public safety or the defence of the realm. Penalties were imposed upon people who had been in communication, or had attempted to communicate, with a spy unless it were proved that they did not know and had no reason to know that such person was a spy. Penalties were also imposed upon people wearing, without authority, naval, military, police or other official uniforms, decorations, medals, or badges, or any of them so nearly resembling the official ones as to be calculated to deceive, or on persons supplying such uniforms, decorations, badges, etc., or representing themselves to be authorized to wear them, as well as on persons tampering with passports, certificates, etc. New

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regulations are constantly being issued as need arises. Their contravention is a contravention of the Defence of the Realm Acts.

Weakening of the Economic Power of the Enemy.

The rules as to naval prizes under international law made it necessary to establish, at an early stage of the war, prize courts according to statutes which had been previously in existence. The work of the prize courts has also been regulated by statutes and ordinances during the war. The institution of naval prizes tends, of course, to weaken the economic power of the enemy. But the most important rule under the common law has been the rule prohibiting trading with the enemy,—in other words, prohibiting any commercial intercourse, not as in former ages with subjects of an enemy state or sovereign, but with all persons of whatever nationality or of whatever allegiance residing on enemy territory or on territory in enemy occupation. This territorial instead of personal principle has been extended so far as to exclude territory which had been taken by the allied forces from the enemy, while on the other hand, territory was included as enemy territory such as those parts of Belgium which are in German occupation. The original proclamation as to trading with the enemy issued at the outbreak of the war reminded British subjects and residents of the British empire of their duty not to trade with the enemy. It has been followed by Trading with the Enemy Amendment Acts, 1914, 1915, 1916. Those acts have not only defined and extended the duties of residents of Great Britain not to trade with the enemy, but they have also made provision for the administration of enemy property in the United Kingdom. The policy of the British government has been not to interfere with the property of alien enemies resident in Great Britain, but to place in the hands of a custodian property of alien enemies residing on enemy territory. In 1916, however, a statute authorized the winding up of business belonging to enemy subjects. Enemy banks which had branches in England, for instance the German Bank, the Dresden Bank, etc., were given permission to carry on their business only in so far as that was necessary to fulfill their obligations toward British subjects and neutrals. Later on, the principle of forbidding commercial intercourse with the enemy was extended to intercourse with firms residing in neutral countries but transacting business with or acting notoriously as agents of firms on enemy territory. The famous "black list" was

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but a list of firms in neutral countries with which, because of their enemy character or association, British merchants were forbidden to transact business.

The Registration of Business Names Act, 1916, was passed for the purpose of compelling the registration of firms not trading under the names of their partners, or of men not trading under their own names, or trading under changed names, etc. Power was also given to the proper authorities to prohibit the use of the word "British" in the name of the firm where such word would give a wrong impression as to the nationality or origin of the firm or the merchant.[10]

STRENGTHENING THE ECONOMIC POWER OF THE COUNTRY.

The modern war is a war not only of soldiers but also of bankers. It was realized in England at the outbreak of the war that the catastrophe which had come suddenly would result in an economic upheaval. Consequently steps were at once taken to preserve the economic balance by closing the banks for a few days and by passing the Postponement of Payments Act, 1914, which enabled the King to issue proclamations authorizing the postponement of payment of bills of exchange, or any negotiable instruments or other payments in pursuance of any contract, etc. (the postponement authorized by the several proclamations issued under this Act terminated on November 4, 1914). In order to strengthen the financial position of the empire, it was also considered necessary to concentrate gold in the Bank of England and to issue treasury notes for ten shillings and twenty shillings as well as to make postal orders legal tender for a time. All these steps, with the exception of the introduction of treasury notes, were of a strictly temporary character and hardly survived the year 1914.

On the other hand, it was soon realized that the war would affect very many business men and also many poor men or men depending on scant incomes which would diminish because of the turmoil. The Courts (Emergency Powers) Act of August 31, 1914, provides that if the proper court is of opinion that time should be given to a debtor under a life or endowment policy not over twenty-five pounds, the premiums of which are payable

[10] See a note by Sir Frederick Pollock in the Law Quarterly Review, April, 1917, p. 115, on this statute, which is only in part a war measure.

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at not longer than monthly intervals, and which have been paid for two years immediately preceding the outbreak of the war, the court may, in its absolute discretion, after considering all the circumstances of the case and the position of all the parties, stay execution or defer the operation of all remedies ordinarily at the disposal of the creditor for such a time and under such conditions as the court may direct. Similarly, where a bankruptcy petition has been presented against any debtor and the debtor proves to the satisfaction of the court that his inability to pay is due to circumstances attributable directly or indirectly to the present war, the court may similarly stay the proceedings for such time and subject to such conditions as it may direct. The same Act was made applicable to all proceedings for the recovery of possession of small tenements as if they were in all cases proceedings for the payment or recovery of a sum of money due and payable on account of rent.[11]

The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, which is to be in force for the period of the war and for six months thereafter, makes irrecoverable any increase in rent (except where otherwise an injustice would follow, e.g., if the landlord has incurred expenditure in improvements; in this latter case, the increase can only amount to six per cent. per annum on the amount so expended), or in interest on mortgages, and as long as the tenant complies with the agreement in accordance with the Act, no order for recovery of possession or for the ejectment of the tenant can be obtained and no mortgage may be called in except under special circumstances which the court has to take into consideration.[12] Rents paid by the tenant contrary to the Act (e.g., if the landlord refuses otherwise to renew the agreement), are recoverable or can be deducted.

An interesting effort to save not only individual energy but also the stocks of coal, was the Summer Time Act, 1916, under which, on an appointed spring day, all clocks were set back one hour, and were advanced again one hour on October 1. This daylight saving measure has certainly helped, to some extent, to promote the purposes of national economy, and has been adopted again in the current year.

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[11] The Courts (Emergency Powers) (No. 2) Act, 1916, was intended to broaden the scope of the Act of 1914 and prevent some hardships. As to the Courts (Emergency Powers) (Amendment) Act, 1916, which relates to officers and men, see above.

[12] The details of the Act must be omitted in this exposition.

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The progress of the war has made it necessary to impose restrictions on the consumption of food-stuffs. One of the first restrictions was contained in the Output of Beer (Restriction) Act, 1916, amended by the Output of Beer (Restriction) Amendment Act, 1916. Under those acts the output of brewers is now limited to 70 per cent. of their previous output, thus reducing the amount of foodstuffs used for the production of beer. At the end of 1916 and since the beginning of 1917 rules have also been laid down limiting the number and prices of meals in restaurants and otherwise designed to prevent waste.

Ludwik Ehrlich.

University of California,
Berkeley, California.

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The Execution of Wills in California.

(CONCLUDED FROM JULY ISSUE.)

VII.

AN attested will must, of course, be in writing.[83] Although wills are frequently acknowledged before notaries public, there is no significance in having a notarial acknowledgment attached thereto.[84]

The following are the prerequisites of an attested will:[85] (1) It must be subscribed at the end thereof by the testator himself, or some person in his presence and by his direction, must subscribe his name thereto. (2) The subscription must be made in the presence of the attesting witnesses or be acknowledged by the testator to them to have been made by him or by his authority. (3) The Testator must, at the time of subscribing or acknowledging the same declare to the attesting witness that the instrument is his will. (4) There must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence.

No will made out of the state is valid as a will in this state, unless executed according to the law of this state, except that a will made in a state or country in which the testator is domiciled at the time of his death and valid under the law of such state or country, will be regarded as valid in this state, so far as the same relates to personal property, with the further restrictions, concerning charitable devises and bequests, already above noted.[86]

An attested will must be "subscribed at the end." A very evident purpose of requiring the testator's name to be subscribed at the end of the will is, not only that it may thereby appear upon the face of the instrument that the testamentary purpose which is expressed therein is a completed act, but also to prevent any opportunity for fraudulent or other interpolations between the written matter and the signature. The "end" of a document offered as a will is not, necessarily, the foot or physical end of the

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[83] Cal. Code Civ. Proc., § 1969, Cal. Civ. Code, § 1276.
[84] Cal. Code Civ. Proc., § 1948.
[85] Cal. Civ. Code, § 1276.
[86] Cal. Civ. Code, §§ 1275, 1313.

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sheet or sheets of paper upon which the "will" is written, but is the physical termination of the testamentary provisions which constitute the will.[87] The requirement that the name shall be subscribed at the end of the will is not satisfied by having the name written at any place after the termination of the written matter, irrespective of the relation which such place bears to the concluding portion of the will; nor does the language require that the subscription be in immediate juxtaposition with the concluding words of the instrument, but that it shall

> "be so near thereto as to afford a reasonable inference that the testator thereby intended to indicate an authentication of the instrument as a completed expression of his testamentary purposes. It must appear upon the face of the instrument not only that he intended to place it at the end of his testamentary provisions, but that he has in fact placed it in such proximity thereto as to constitute a substantial compliance with this requirement of the statute."

The true test

> "to determine whether a decedent has subscribed his name at the end of a will is to take the document as it left his hand, and then, disregarding the signatures of the witnesses, and all evidence *aliunde,* to see whether it is apparent that his name was placed where it appears for the purpose of execution."[88]

A deceased[89] wrote his name to an instrument at the end of that part of the paper making disposition of his estate and before the clause appointing an executor. The subscribing witnesses signed their names at the same place. It was claimed that the whole paper was invalid as a will, since the statute required that a will should be subscribed at the end thereof and a clause appeared after the signature showing that the paper was not subscribed "at" the end. The court held that since the subscription by the testator was made "at the end of the disposing part" and since a will may be made which does not appoint an executor, "the portions of the paper preceding the signature constitute a complete will and can be admitted to probate and an administrator with the will annexed appointed."

In the Estate of Blake,[90] the will was written on a blank form. After the testamentary provisions, there was a blank space of

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[87] Estate of Seaman (1905), 146 Cal. 455, 80 Pac. 700.

[88] See concurring opinion of C. J. Beatty, Estate of Seaman, supra, n. 87.

[89] Estate of McCullough (1875), Myr. Prob. Rep. 76.

[90] (1902), 136 Cal. 306, 68 Pac. 827.

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more than half a page on which there was no writing or printing. On the following page, under the heading "Lastly," the provision as to the appointment of the executrix was made; then followed the clause "In witness whereof,", etc., and then the name "Thomas M. Blake." The court held that the will was signed "at the end thereof" within the meaning of the statute. It said:

> "There is no provision as to the disposition of property or provision of any other kind after the name of the testator. The name was signed at the end but not immediately at the end of the testamentary provisions. It was not necessary for the signature to have been on the first or second line below the testamentary clauses."

In the Estate of Seaman,[91] the instrument offered as the last will and testament of the deceased was written upon a printed form or blank consisting of four pages folded in the middle like ordinary legal cap. Upon the upper portion of the first page was a printed heading or introduction, occupying about one quarter of the page; in the printed form the remainder of that page and the entire second page were left blank. The dispositive parts of the will were written upon the blank portion of the first page and on one fourth of the blank portion of the second page, and at the close thereof a line was drawn in red ink transversely to the bottom of the second page. At the top of the third page there was printed a form for the appointment of the executor and a clause revoking all former wills. Immediately after this there was a testimonium clause, underneath which and extending to a little below the middle of the page, was printed an attestation clause. The blanks left for the name of an executor and for the attestation of the will were left unfilled. The remainder of the third page and the first or upper half of the fourth page were blank. The printed form was prepared to be twice folded from the bottom to the top, and across the face of the paper as thus folded and at the top thereof, were the printed words: "The last will and testament of" under which the scrivener had written "Henry Seaman." Blank forms for a date and for filing the instrument with the clerk were printed underneath this, the whole occupying the upper half of this outside face of the paper when folded. Underneath this printed matter was written "Henry Seaman" and underneath that, the names "M. O. Wyatt, J. H. Wright." The remainder of the fourth page was blank. It was

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[91] Supra, n. 88.

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shown at the hearing that the decedent had written his name at that place in intended execution of his will and that at his request Messrs. Wyatt and Wright had signed their names as witnesses thereto. In accordance with the rules above set forth, the court held that the will was not subscribed "at the end" thereof by the testator.

In the main opinion it was said that

> "while a slight space such as a single line, or even more, might be left blank between the written matter and the name without impairing the validity of the will, yet, to leave blank an entire page between the two would indicate a disregard of the requirements of the statute, whether resulting from ignorance or intention, which should prevent its admission to probate."

In a concurring opinion by Justice Angelotti, it is suggested that,

> "The mere extent of space between the termination of a will and the subscription ought not to affect the question as to whether the statute has been complied with, if the document, on its face, disregarding the signatures of the witnesses and all outstanding evidence fairly indicates that the name was so placed by the testator as a subscription and for the purpose of execution. The extent of space is, of course, material upon the question as to what the document does indicate upon its face."

In the *Estate of Hartter*,[92] the instrument offered as the will of the deceased consisted of one page, the upper portion of which constituted the disposing part of the will; then followed the attestation clause. The line provided for the signature of the testator was blank. The deceased, however, signed his name below the line provided therefor, in a blank space in the attestation clause. One of the subscribing witnesses testified that the deceased wrote his name in the blank space of the attestation clause in the presence of both the subscribing witnesses and that he declared to them that the document was his will and that he requested them both to sign their names as witnesses, which they did in his presence and in the presence of each other. The court held that the instrument was subscribed "at the end thereof," since it appears that the testator intended his subscription to be at the end of the docu-

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[92] (1914), 6 Coffey's Prob. Dec., 293.

[93] Noon's Will, 31 Misc. 420, 65 N. Y. Sup. 568; Gibson's Will, 128 App. Div. 769, 113 N. Y. Sup. 266; Younger v. Duffie, 94 N. Y. 535, 46 Am. Rep. 156; Matter of Gilman, 38 Barb. (N. Y.) 364; Will of Cohen, 1 Tucker 286 (N. Y.)

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ment and it was so understood, not only by the testator, but by the witnesses as well. This conclusion of the court is supported by authorities from other jurisdictions in construing statutes similar to those of California[93] on this subject.

In a recent case,[94] the name of the testator was written a short distance below the body of the will. The witnesses afterwards inserted their signatures above that of the testator. The court held that the will was subscribed "at the end thereof" and that the relative positions of the witnesses' names and the testator's name were immaterial, since the statute does not require that the testator's signature shall occupy any specific place with reference to the signatures of the witnesses.

An attested will must be subscribed at the end thereof "by the testator himself or some person in his presence and by his direction must subscribe his name thereto." It is to be borne in mind that, for an attested will to be valid, whether it be subscribed by the testator himself or whether some person in his presence and by his direction subscribes his name for him, it must be subscribed "at the end." To those who cannot write is accorded the privilege of directing some other person, that he subscribe the testator's name to the instrument. This must be done in the presence of the testator[95] and the person who subscribes the testator's name, by his direction, must write his own name as a witness to the will. If, however, he does not write his own name as a witness to the will, its validity is not affected.[96] The subscription, therefor, by a witness to a will, of the name of the testator, made under his direction, in his presence and at his request, is a sufficient execution of the will, although the person signing his name omits to write his own name near the signature, as a witness to his signature.[97]

The writing of the "name" is not essential to a "signing." "To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance or obligation. The signature is the sign thus made."[98] Ordinarily, when a person cannot write, he may sign or subscribe by making a mark and his name must be written near the mark by a person who must write his

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[94] Estate of Dutcher (1916), 172 Cal. 488.
[95] Subd. 1, Cal. Civ. Code, § 1276.
[96] Cal. Civ. Code, § 1278; Estate of Toomes (1880), 54 Cal. 509.
[97] Estate of Langan (1887), 74 Cal. 353, 16 Pac. 188.
[98] Estate of Walker, supra, n. 2; Estate of Manchester, supra, n. 74.

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own name as a witness; provided further, that when a signature is by mark, it must, in order that the same may be acknowledged or may serve as the signature to any sworn statement, be witnessed by two persons who must subscribe their own names as witnesses thereto.[99]

Since a will need be neither acknowledged nor considered as a sworn statement, the proviso above noted has no application. But what can be said to be the effect when a testator subscribes the will by mark and his "name" is not written nearby by some other person? If a person subscribes the testator's name, by his direction, near the mark made by the testator, and then signs his own name as a witness to the will, Section 14 of the Civil Code is fully satisfied. If, however, the person so writing the testator's name does not add his own name as a witness to the will, the validity of the will is not affected.[100] Suppose the scrivener or a witness to the will does not write the testator's "name" any place upon the document and the testator merely "signs" by making a mark, is the will properly executed? This question has never been squarely decided by the Supreme Court.

Construing Sections 1276 and 1278 of the Civil Code together, it appears that an attested will "must be subscribed . . . . by the testator himself or some person in his presence and by his direction must subscribe his name thereto" and "a person who subscribes the testator's name, by his direction, must write his own name as a witness to the will." While the Suprme Court has held[1] that "to subscribe is to attest or give consent or evidence knowledge by under writing, usually (but not necessarily) the name of the subscriber," we are inclined to the opinion that the evident intention of the legislature was to require that the "name" of the testator appear somewhere in the instrument, otherwise great difficulty might often result in identifying a certain document with a particular decedent.

With reference to wills, Section 14 of the Civil Code is superseded by Section 1278 of the Civil Code, in so far as it is inconsistent with it. The latter section, however, would have no application to the hypothetical case suggested, for the reason that the testator's name is assumed not to have been written by another. Under these circumstances, we believe that Section 14 of the Civil Code

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[99] Cal. Civ. Code, § 14.
[100] Id., § 1278.
[1] Estate of Walker, supra, n. 2.

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would apply,[2] and if a will were executed merely by mark and nothing more, and if the testator's name did not anywhere appear, the signing or subscription would be inadequate.

A case which comes nearest this question is the Estate of Guilfoyle,[3] but the distinction to be noted is that, in this case, the name of the testatrix, appearing in the beginning of the document, was written by a person who signed as a witness. The instrument offered as the will of the deceased was written in pencil covering a single page of small note paper as follows:

August 29, 1891.

"I Bridget Guilfoyle, leave $500 (five hundred dollars) for masses at St. Patrick; also want a nice funeral and all other expenses to be paid from what I leave, and the rest to my two nieces, Maria and Aggie Johnson, equally.

X

Ellen O'Connor.

Witness:—

Emma Endres.

Mary Daly."

The will appears to have been written by the witness Emma Endres at the request of the deceased. After it was written, the witness, Emma Endres, read the will to the deceased in the presence of the other subscribing witnesses. The deceased was then asked whether that was her will and she answered that it was. She was then given a pen by the witness Emma Endres and though the deceased knew how to write her name, she was physically too weak to do so. She made a cross at the end of the paper, and declared that such paper was her will and requested Emma Endres, Mary Daly and Ellen O'Connor to sign the same as witnesses. Under these facts, where the whole body of a will, including the name of the testatrix, was written by one who was a subscribing witness to the will, and the will was signed by a mark made by the testatrix, without repeating the name in immediate connection with the mark, the mark was held to be a sufficient signature under the terms of Section 14 of the Civil Code. The court suggested that the only object of Section 14 of the Civil Code in requiring that when a person who cannot write, signs an instrument by his mark, his name must be written near the mark, is to show what name the mark is intended to repre-

[2] See Estate of Dombrowski (1912), 163 Cal. 290, p. 296, in which the court declines to pass upon this point.

[3] (1892), 96 Cal. 598, 31 Pac. 553.

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sent, and if it clearly appears from the instrument what name the mark was intended to represent, it must be held to be sufficiently near the name.

In the Estate of Dombrowski,[4] the document offered as the will of the decedent was typewritten in form and witnessed by three subscribing witnesses. At the time of the execution of the will, the deceased, unable to write her name by reason of illness, requested Maple, her legal advisor and one of the persons named as executors, to write her name. This he did, adding the words "her mark," as follows:

Fannie her mark Dombrowski

Mrs. Dombrowski made a cross (x) in the space left between her given name and her surname, and the three witnesses signed the attestation clause and also signed their names under the words "witnesses to mark," which had also been written by Maple. Mr. Maple, however, did not write his own name on the paper as a witness or otherwise. The testimony indicated that the decedent requested the subscribing witnesses to sign as witnesses to her wark, as well as to become attesting witnesses to the will.

The court held that since it appeared that the name of the testatrix was subscribed by Mr. Maple, in her presence and at her direction, the requirements of Sections 1276 and 1278 of the Civil Code had been fully met and that the will was valid even though Mr. Maple did not sign his name as a witness.

The following quotations from the opinion bear upon the question last above discussed:[5]

> "But the appellants argue that the decedent did not intend to perform the testamentary act by having her name written by another person; that what she in fact undertook to do was to sign her name by mark, and that such signing was incomplete and ineffectual for want of compliance with the requirement of section 14 of the Civil Code, that where a subscription is by mark, the name of the person so signing is to be written near the mark, by a person 'who writes his own name as a witness.' Here, as has been stated, the person (Maple), who wrote the name of Mrs. Dombrowski, did not write his own name as witness. While, accordingly, the writing of the testatrix's name by Maple would have been sufficient, if nothing more had been contemplated or done, yet where such

[4] Estate of Dombrowski, supra, n. 2.
[5] 163 Cal. pp. 293, 294.

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writing was merely a step in an ineffectual attempt to sign by mark, there was, it is claimed, no completed subscription by either method. The subscription by mark was defective for want of the signing as witness by the person writing the name. The execution was not sufficient under section 1276, because the decedent never intended that the writing of her name by Maple, without the making of her mark, should complete her act of formal execution.

The argument thus advanced rests upon rather refined and technical reasoning. The testatrix unquestionably intended to execute a will, and performed certain acts in order to carry out this intent. She did everything necessary, under the statute, to a valid execution. Is her act to be overthrown because, in addition, she tried to do something more? All that was done—the direction to Maple to write her name, his writing of it, the making of a mark—taken together, formed a single transaction, every part of which was influenced by the one intent of executing a will. To say that the decedent intended to sign by mark, rather than under section 1276, is to lose sight of the real nature of her acts. What she intended was to execute a will. No doubt she thought that all of the acts performed were necessary, or at least proper, parts of a valid execution. But there is no good ground for saying that she intended that one of them, rather than another, should accomplish the desired end. Her intent was to carry out and authenticate her testamentary purpose by means of all these acts. The essential facts are that she did everything which she designed to do in executing her will, and that what she did included the formalities required by the statute for such execution. This being so, the validity of that which was rightly done is not affected by the circumstance that she may have entertained and acted upon the belief that something more was needed. . . . ."

"We have assumed,[6] in the foregoing discussion, that the undisputed evidence shows, as appellants contend, that the decedent contemplated making her mark when she directed the writing of her name, and that she did not intend that execution should be complete until all of the acts—the writing of her name by Maple, the making of a mark by herself, and the witnessing of her mark by the three who did witness it—should be accomplished. We have also assumed that the provision of section 14, requiring one who writes the name of a person signing by mark to write his own name, is applicable to the execution of wills. Both points are disputed by the respondents, but we think it unnecessary to express an opinion upon either. We prefer to rest our decision on the broad proposition that there is a valid execution where a person

[6] 163 Cal. p. 296.

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undertaking to make a will has done certain acts with the intention of thereby executing his will, leaving undone nothing which he undertook to do to carry out that intention, and the acts done include everything necessary, under our statutes, to the execution of a will."

VIII.

The subscription of a will by the testator or by some person in his presence and by his direction, must be made in the presence of the attesting witnesses, or, if this is not done, it is sufficient if the testator acknowledges to the witnesses that the subscription was made either by him or by his authority.[7]

It is immaterial whether the testator signs his name before or after the witnesses sign their names to the document executed as a will, so long as it appears that all of the parties signed it at the same time and as part of the same transaction. "The statute," the court said, "does not" make the order of signing material.[8]

We can hardly subscribe to this construction of the statute. The natural and logical sequence of events in the execution of a will is, first, the execution by the testator, and, next, the attestation by the witnesses. That the legislature had this sequence in mind is evidenced by the order in which the words and provisions of Section 1276 of the Civil Code appear "Every will . . . . must be executed and attested as follows". It is to be noted that the word "executed" appears before the word "attested". There are four subsections of Section 1276 of the Civil Code. The first three subsections refer to the execution of the will by the testator, while the last subsection refers to the attestation by the witnesses. Does this not clearly indicate that the execution by the testator was intended to precede the attestation by the witnesses?

It is anomalous to say that the witnesses may attest the will by signing it before the testator executes the same. It they do, what are they attesting? The very term "attestation" or "attest" means: "to certify", "to affirm to be true or genuine" "to see a writing executed or hear it acknowledged, and at the request of the party to sign the name as a witness".[8a] If, therefore, there has been no execution or acknowledgment by the testator, how can there be an attestation by the witnesses? Is it not

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[7] Subd. 2, Cal. Civ. Code, § 1276.
[8] Estate of Silva, supra, n. 26.
[8a] Vol. I Words and Phrases 628.

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violating the intention of the legislature and the language of the statute, and is it not dangerous, to excuse an improper sequence of acts concerning the execution of wills by saying that the execution is valid "so long as it appears that all of the parties signed it at the same time and as part of the same transaction"?

The acknowledgment of a signature by a testator is not required to be made in any particular words or in any specified manner; but if by sign, motion, conduct or attending circumstances, the attesting witnesses are given to understand that the testator has already subscribed the instrument, this is a sufficient acknowledgment.[9]

In an early case,[10] the deceased was an unlettered man, being able neither to read nor write. At his request, a friend, using a printed blank, filled out a paper intended for a will. It was prepared under the deceased's immediate supervision and according to his instructions. After keeping it about three weeks, the deceased desired to have it executed and requested his friend to write his (the deceased's) name at the foot of the paper. The deceased made a cross at the end of his name. Some two or three days after that, the deceased and his friend, knowing that it was necessary to have two witnesses, went to a neighbor's house and found two acquaintances. The deceased produced the paper from his pocket and said to the persons, "I want you to witness my will." The paper was placed on the table and both witnesses signed the printed attesting clause. The deceased did not say anything about his signature, or his mark, or about his having had his name signed. The name of the friend who signed the deceased's name does not appear on the paper. The court held that under Section 1278,[11] the fact that the deceased's friend did not add his name did not invalidate the will. The court, however, held that the subscription of the will had not been acknowledged by the testator and for that reason was invalid. The court pointed out that the testator should have called the attention of the witnesses to the fact that he had signed the document and that it had been subscribed either by him or by someone else, under his authority.

IX.

The testator must, at the time of subscribing or acknowledging

[9] Estate of Williams (1895), 5 Coffey's Prob. Dec. 1.
[10] Estate of Taney (1878), Myricks Prob. Rep., 210.
[11] Cal. Civ. Code, § 1278.

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his will, declare to the attesting witnesses that the instrument is his will.[12] It is not necessary that the testator should speak words, declaring a document to be his will. It is sufficient if this declaration is unmistakably indicated to the persons signing as witnesses, by the testator's conduct and actions, although there is no declaration in words to that effect.[13]

In the Estate of Fusilier,[14] a paper was offered for probate as the last will of the deceased. The instrument was prepared by an attorney, at the request of a friend of the deceased. This friend, employed in a bank, arranged to have the will executed at the bank. The paper was placed on the counter before the deceased and his friend pointed out to him the place to sign. The deceased signed at the place indicated, and his friend then turned to the witnesses, and requested them to sign, pointing to the places for their signatures. The witnesses signed as requested. Both of the witnesses saw the deceased sign the instrument and he saw them sign it. Both witnesses were sworn and both testified that the deceased made no declaration or said anything of consequence with reference to the document as a will; there was no declaration made in words by the deceased, or by any other person, that the instrument was a will. The court denied probate to the instrument on the ground that there had been no declaration to the attesting witnesses that the instrument was his will. The court said:

> The declaration may be by words or acts; it may be done by the testator in person or by some person, in his presence and by his authority, but in some way, and at the time, the witnesses must be informed by the testator that he wishes them to understand that the paper is executed as his will. A mere tacit signing by the testator with attestation by the witnesses is not enough."

Although it is necessary that there be a declaration to the witnesses, in some form, that the instrument is a will, it is not necessary to the validity or due execution and publication of a will that the subscribing witnesses or any of them should be informed of or have any knowledge whatever of the contents of the document.[15]

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[12] Subd. 3, Cal. Civ. Code, § 1276.
[13] Estate of Silva, supra, n. 26; Estate of Cullberg (1915), 169 Cal. 365, 146 Pac. 888.
[14] (1873), Myr. Prob. 40.
[15] Estate of McGinn (1889), 3 Coffey's Prob. Dec. 26.

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In an attested will, there must be two attesting witnesses, each of whom must sign "the same" as a witness, at the end of the will, at the testator's request and in his presence.[16]

Prior to 1905, the code section provided that each witness must sign "his name." An amendement was passed[17] changing "his name" to "the same," in order to avoid a certain construction which the Supereme Court had given to the section and which will be noted hereafter.[18] However, Section 1278 of the Civil Code was permitted to remain as it was, providing that a witness to a written will must write with his name, his place of residence.

Before construing the language of Subdivision 4, Section 1276 of the Civil Code, there are other sections which should be borne in mind.

A witness to a written will must write, with his name, his place of residence; but a failure to do this will not affect the validity of the will.[19] All beneficial devises, legacies and gifts whatever, made or given in any will to a subscribing witness thereto, are void unless there are two other competent subscribing witnesses to the same; but a mere charge on the estate of the testator for the payment of debts, does not prevent his creditors from being competent witnesses to his will.[20] If a witness to whom a void beneficial devise, legacy or gift, is made, would have been entitled to any share of the estate of the testator, in case the will should not be established, he succeeds to so much of the share as would be distributed to him, not exceeding the devise or bequest made to him in the will.[21]

While there may be more than two subscribing witnesses to an attested will,[22] there can not be less than two. A subscribing witness is one who sees the writing executed or hears it acknowledged, and thereupon signs his name as a witness at the maker's request and in his presence.[23]

Although it is customary, usual, and perhaps advisable, for

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[16] Subd. 4, Cal. Civ. Code, § 1276.
[17] Stats. 1905, p. 605.
[18] Estate of Walker, supra, n. 2.
[19] Cal. Civ. Code, § 1278.
[20] Id., § 1282.
[21] Id., § 1283.
[22] Estate of Dombrowski, supra, n. 2.
[23] Estate of Blythe (1889), 4 Coffey's Prob. Dec. 445.

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an attested will to have an attestation clause,[24] it is not essential to its validity that there be an attestation clause.[25]

It is not even necessary that the witnesses sign the instrument "as witnesses." The mere signing of their names, without designating that the signing is made "as witnesses," will be regarded as sufficient.[26]

It is not necessary that the testator should speak words expressly requesting the witnesses to sign the will. It is sufficient if this request is unmistakably indicated to the persons signing as witnesses, by the testator's conduct and actions, although there is no request in words to that effect.[27]

While the request to a witness to sign his name to a will should come from the testator and not from a third person,[28] yet the request is unquestionably good if it is made by a third person, provided the testator understands the matter and acts in accordance with the making of the request.[29]

In the Estate of Tyler,[30] the concluding part of the instrument offered as the will of the deceased, was as follows:

> "In witness whereof I have hereunto set my hand and seal in the presence of John Heard and ....., who I request to sign their names hereto as subscribing witnesses.
> (Signed)
> "John Heard (Signed) Anna Foster (Seal.)
> "Fred B. Berger"

The signature of the testatrix was proved. The attesting witness Heard was dead and his signature was proved. The witness Berger testified that although he remembered signing the will and

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[24] The form usually used is as follows:
"The foregoing instrument, consisting of ..... pages, including this, was signed and subscribed by ....., the person therein named as testator, at the City of ....., County of....., State of California, on the ..... day of ..... in the year ....., in the presence of us, all being present at the same time, and was, at the time of his so subscribing the same, acknowledged and declared by him to us, to be his last will and testament, and thereupon we, at his request, in his presence, and in the presence of one another, have subscribed our respective names as witnesses thereto, to which we have added our respective residences."

[25] Estate of Kent (1911), 161 Cal. 142; Estate of Crittenden (1873), Myricks Prob. Rep. 50; Estate of Hartter, supra, n. 92; Estate of Fallon (1886), 5 Coffey's Prob. Dec. 426.

[26] Estate of Kent, supra, n. 25.

[27] Estate of Silva, supra, n. 26; Estate of Cullberg, supra, n. 13; Estate of Fallon, supra, n. 25; Estate of Crittenden, supra, n. 25.

[28] Estate of Thompson (1894), 3 Coffey's Prob. Dec. 357.

[29] Estate of Crittenden, supra, n. 25.

[30] (1898), 121 Cal. 405.

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swore to his signature, he had no definite recollection of certain things which occurred at the time he attested the will. He could not remember whether the testatrix actually signed the instrument or verbally acknowledged her signature to it in his presence, or whether she declared the document to be her will in the presence of the attesting witnesses, or whether she requsted him to sign as an attesting witness. He did not testify, however, that these things were not done, nor was there any evidence to impeach the execution of the will or to throw upon it a shadow of any kind of suspicion. The court held that the will was properly executed and said:

> "While the code provides that certain things are necessary to the making of a valid will, it does not prescribe how those things shall be proven; it leaves that to the general rules of evidence. . . . . But there is no statutory declaration and no principle of law to the effect that a will executed in due form shall go for naught unless an attesting witness after the lapse of many years shall continue to recollect everything material that occurred at the time he subscribed his name to it."[81]

Each of the subscribing witnesses must sign the will in the presence of the testator. While the statute does not, in so many words, prescribe that the witnesses sign the will in the presence of each other, yet the approved practise of execution is that the will be signed by each of the witnesses, not only in the presence of the testator, but in the presence of each other as well. This "approved practice of execution" has recently received judicial sanction in the Estate of Emart,[81a] wherein, we are frank to confess, the dissenting opinion of Mr. Justice Sloss seems to be better reasoned than the prevailing opinion. In making this comment, we do not desire to subscribe to the advisablity of the rule suggested by Mr. Justice Sloss, but rather to the correctness of his conclusions construing the statutes of California.

In the Estate of Emart, one of the attesting witnesses attested the will in the forenoon of the day upon which it was executed, and the other attesting witness attested it in the afternoon. The witnesses did not sign their names or attest the will in the presence of each other. The testatrix subscribed her will in the pres-

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[81] The final decision of the Supreme Court in this case is erroneously reported in 50 Pac. 927 and 5 Cal. Unrep. Cases 851.

[81a] (June 1, 1917), 53 Cal. Dec. 691, 165 Pac. 707.

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ence of one of the witnesses and acknowledged her subscription to the other attesting witness. It is the aim of the prevailing opinion to show, from the language of our statute and the history of legislation upon the subject of wills, that the subscription or acknowledgement by the testator must be before the two witnesses present at the same time. Until changed by legislation or judicial decision this is now the rule in California.

While this rule is, indeed, a good one, we do not believe that the language of the statute warrants its adoption. Subdivision 4 of Section 1276 of the Civil Code provides that "there must be two attesting witnesses, each of whom must sign the same as a witness, at the end of the will, at the testator's request and in his presence." It does not provide that the witnesses sign " in the presence of each other" or "at the same time." Courts are not justified, as suggested by the dissenting opinion, "in reading into the law a demand for the performance of any act or formality not included within its terms."

It is true, as suggested by the prevailing opinion, that "if the will is acknowledged to the one witness on one day and to the second witness months, or even years, thereafter, both witnesses will not be witnessing or attesting under the same state of facts, that is to say, neither witness could declare that at the time the other witnessed it, the testator was apparently free from duress, menace or undue influence, and was of sound and disposing mind." Nevertheless, the rule depends not upon policy, but upon statutory interpretation. While it is undoubtedly advisable that a will be subscribed or attested in the joint presence of the witnesses, yet the necessity for the joint presence of the witnesses during any part of the testamentary act should be held to exist "only when the statute contains direct and explicit language to that effect. . . . . when it declares that the signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time." We feel that, in announcing the rule, the majority of the court read into the statute a demand for the performance of an act or formality not now included within the terms of the statute.

"In the presence of the testator" has been construed to mean that the testator must not only be present physically but mentally, in order that there be an appreciation of the acts taking place before him.[82] Where the instrument was signed by the subscrib-

[82] Estate of Fleishman (1892), 1 Coffey's Prob. Dec. 18.

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ing witnesses in an apartment adjoining the room in which the testatrix was lying ill upon her bed, beyond the sight or hearing of the testatrix, the court held, that the will was not attested "in the presence of the testator."[33]

The witnesses must sign "at the end of the will." The construction of the requirement of the testator subscribing the will "at the end," is applicable to the signing by the witnesses. It has been decided[34] that a will is valid where witnesses sign and insert their names above that of the testator, who had signed his name a short distance below the body of the will. If a testator subscribes his name "at the end" but the witnesses do not sign "at the end," then the instrument is improperly executed.

If a subscribing witness cannot write, he may sign by making a mark, provided that his name is written near the mark by a person who writes his own name as a witness thereto.[35] In the Estate of Derry,[36] one of the witnesses to the will, could not and did not write his name. The other witness, besides signing as a witness to the will, wrote the name of his associate witness and wrote his own name as a witness to the mark of the associate. The court held that this was a good witnessing of the will.

Prior to the amendment of 1905,[37] the statute provided that "there must be two attesting witnesses, each of whom must sign his name as a witness" etc. With the statute in this condition, an instrument was offered for probate as a will,[38] wherein one witness, Joseph P. Jones, wrote his name in full. The other witness, William H. Ford, wrote the abbreviation "Wm." and the first down stroke of the initial "H." There the signing stopped, as if the ink ceased to flow. The court held, that the will was insufficiently executed for the reason that the witness Ford had not signed "his name" as a witness. No person could tell, the court suggested, from an examination of the paper, whether the name of the witness was "William H. Ford, or William H. Smith, or William H. anything. The word Ford is an essential part of the witness' name."

In a later case,[39] the will of the deceased was written by Mr.

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[33] Estate of Fleishman, supra, n. 32.
[34] Estate of Dutcher, supra, n. 94.
[35] Cal. Civ. Code, § 14.
[36] (1878), Myr. Prob. 202.
[37] Stats. 1905, p. 605.
[38] Estate of Winslow (1876), Myr. Prob. 124.
[39] Estate of Walker, supra, n. 2.

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Warren, his attorney, and was executed in the presence of Mr. White and Mr. Warren who were requested by the testator to attest, as witnesses to its execution. The requirements of the statute were complied with in all respects, saving as to the witness C. G. Warren, who in signing his name as a witness at the end of the will, inadvertently wrote the name "C. G. Walker," thus employing his own initials but the testator's surname. The court held that the witness had not attached his own name to the will as a witness and it was therefore insufficiently executed. The court said:

> "I conclude therefore, that as our law has seen fit to prescribe that the testator shall subscribe his will at the end thereof, so it has seen fit to require that attesting witnesses shall sign and shall sign only in one way, that is to say, by affixing their names."

In order to avoid this technical and strict construction which the court placed upon the language of subdivision 4 of Section 1276 of the Civil Code, the words "his name" were changed to read "the same." It is now necessary, under this section, for a witness merely to sign the instrument even though Section 1278 of the Civil Code still indicates that a witness should sign "his name." However, it is to be borne in mind that a violation of Section 1278 of the Civil Code "does not affect the validity of the will."

"To sign," has been held[40] to mean the making of any mark.

> "To sign an instrument or document is to make any mark upon it in token of knowledge, approval, acceptance, or obligation. The signature is the sign thus made. And while, by long usage and custom, signature has come generally to mean the synonym of autograph, that signification is derivative, and is not inherent in the word itself any more than it is in autograph, which strictly conveys no more than the idea of a specimen of an individual's writing.
>
> Any mark may be a signature, and that species of mark which we call a cross (independent of an accompanying name) was early used as a signature of assent, and indeed was designated *signum*."

The required formalities surrounding the execution of attested wills seem to be well defined and are readily susceptible of precise compliance. The dissemination of these formalities, together with what has definitely been regarded by our Supreme

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[40] Estate of Walker, supra, n. 2.

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Court as satisfying the requirements of an olographic will, should be helpful in avoiding contests entered against the probate of documents as wills, upon the ground of the lack of their due execution and attestation by the decedent or subscribing witnesses.

Nat Schmulowitz.

San Francisco, California,
March, 1917.

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Some Reasons Why the Code States Should Adopt the Uniform Sales Act.

(CONTINUED FROM JULY ISSUE)

A STEP TOWARD UNIFORMITY WITH THE LAWS OF OTHER STATES.

AGREEMENT with the greatest weight of authority.—It has already be briefly indicated[45] how our law is defective from lack of uniformity with the laws of other states. The remedy proposed is to adopt the Uniform Sales Act. The Act has already been adopted in a considerable number of states.[46] Complete uniformity with the laws of all other states by this simple means is as yet unattainable, the Act not yet having been everywhere adopted. It has been adopted already, however, in a sufficient number of states to constitute the largest mass of authorities in agreement on the questions dealt with to be found in the country. The states which have adopted it now have the same rules of law on the questions involved. On those questions many other states have each some local law. On the whole, that law often agrees with the rules in the Uniform Sales Act,[47] but it is not always the same on all points.[48] Moreover, the laws of the states which have not adopted the Uniform Sales Act, where they differ from the rules in that Act, may differ diversely in the different states.[49] If the law of a particular state

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[45] See Adoption of Uniform Sales Act, 5 California Law Review, 400.

[46] To the list given at p. 404 of the previous article should be added Minnesota and Utah, where the Act was also finally passed in the spring of 1917, making a total of eighteen jurisdictions in all.

[47] The Uniform Sales Act being a careful codification of the common law generally prevailing, the rules of law therein expressed accord with much actual case law in the various states throughout the country.

[48] In regard to the questions on which there is much division of authority, the local law may not always be same as that expressed in the Act.

[49] A ready example is afforded by the different view adopted in different jurisdictions as to whether title passes when the price of the goods yet remains to be determined by some further act, such as weighing or measuring. In some states it is held that there is a presumption in such cases that title was not intended to pass, even when the weighing or measuring was to be done by the buyer. See McFadden v. Henderson (1901), 128 Ala. 221, 29 So. 640; Pinkham et al. v. Appleton (1890), 82 Me. 570, 20 Atl. 237. In other states it is held that there is such a presumption only if what remains to be done is to be done by the seller. See

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is not in accord with the Uniform Sales Act, it does not follow therefore that its position is supported by the law of the other states which have not adopted the Act. Many of them may agree with the rule in the Uniform Sales Act on that particular point, while those that disagree scatter in several directions. Adoption of the Uniform Sales Act in the Code States would therefore place our law, to that extent, in accord with the largest unified body of law on the subject prevailing at the present time in the country.

Increase of uniformity everywhere.—It should not be forgotten, moreover, that the adoption of the Uniform Sales Act is in this respect more than a local matter. Inconveniences to us arise from differences between our law and the laws of other states.[50] As a step toward removing those inconveniences, let it be assumed that we adopt the Act. By adopting the Act we not only remove our own inconveniences in that respect, but also remove, in so far, the inconveniences of those with whom we deal in other states. All have suffered from the inconveniences arising from the same cause, lack of uniformity. If that cause is removed, it relieves everyone concerned, and enables business with others to be carried on more satisfactorily in every way. By removing the lack of uniformity here, therefore, we not only improve our own law in this respect, but contribute a part toward improving the law of every other state, and reap

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Hagins v. Combs (1897), 102 Ky. 165, 43 S. W. 222; Day v. Gravel (1898), 72 Minn. 159, 75 N. W. 1. In many states it has been held that there is such a presumption if the price still remains to be ascertained, the court not adverting particularly to the question of who is to do the weighing or measuring. See Jones v. Pearce (1869), 25 Ark. 545; Commercial Bank v. Gillette (1883), 90 Ind. 268; McClung v. Kelley (1866), 21 Iowa 508; Smart v. Batchelder (1876), 57 N. H. 140; Hamilton v. Gordon (1892), 22 Ore. 557, 30 Pac. 495; Simth v. Evans (1892), 36 S. C. 69, 15 S. E. 344; Gibbs v. Benjamin (1872), 45 Vt. 124; Pacific Coast Elevator Co. v. Bravinder (1896), 14 Wash. 315, 44 Pac. 544; Bank of Huntington v. Nafier (1895), 41 W. Va. 481, 23 S. E. 800. In still other states it is held that there is no presumption at all as to whether or not title is intended to pass, from the mere fact that weighing or measuring to determine the price still remains to be done. See Lassing v. James (1895), 107 Cal. 348, 40 Pac. 534; Boaz v. Schneider (1887), 69 Tex. 128, 6 S. W. 402. This position was also taken in New York before the Uniform Sales Act was adopted there (Sanger v. Waterbury, [1889] 116 N. Y. 371, 22 N. E. 404; Bayne v. Hard, [1903] 174 N. Y. 534, 66 N. E. 1104), and is the position adopted in the Uniform Sales Act, § 19, now in force in a considerable number of states. As to the authorities on this question at common law, see, further, Williston on Sales, § 269, and Mechem on Sales, §§ 515-532.

[50] See the previous article, p. 407.

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the reward of dealing in a more satisfactory way with those with whom we do business throughout the country.

Uniformity in dealing with precedents.—A further consideration in regard to the effect of the adoption of the Uniform Sales Act toward bringing about uniformity with the laws of other states may be mentioned. The decisions of the courts of a number of states, on questions arising in regard to sales, are already being rendered under the Uniform Sales Act. Before the Uniform Sales Act is adopted here, can anyone tell what weight to attach to those decisions, as authorities, when they are cited to our courts as against conflicting decisions on similar facts from states where the Act is not in force? If the Uniform Sales Act were adopted, this question could present no difficulty, since the Act itself contains an express provision[51] on the weight to be given to decisions under the Sales Act in other states.[52]

A Greater Measure of Certainty.

Much more important, as a local matter, than securing uniformity with the laws of other states is the question of securing certainty in our local law.[53] The ordinary litigation in our courts is usually between local people in regard to local transactions. For every instance of difficulty on account of lack of uniformity with the laws of other states in regard to sales, there are many instances of difficulty because the local law of sales is too uncertain. It is not here contended that absolute certainty can be attained. All legal history belies any such possibility. As controversies arise and new situations are presented, courts will be needed to apply the law. It is submitted, however, that the adoption of the Uniform Sales Act would definitely settle many unsettled questions in our local law, render it more certain to that extent, and thereby reduce the need of frequent and long continued litigation.

A comparison of the present position of our law with the provisions in the Uniform Sales Act will demonstrate that, in many respects, the prevailing uncertainty may be reduced to

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[51] See Uniform Sales Act, § 74.

[52] As to how § 74 has fared in the courts, see in ensuing article, n. 13, and especially Commercial National Bank v. Canal-Louisiana Bank & Trust Co. (1915), 239 U. S. 520, 36 Sup. Ct. Rep. 194.

[53] See the previous article, at p. 408 et seq.

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greater certainty. The discussion to follow assumes that it is desirable to have rules of law definite and settled,[54] and is confined to showing the more important particulars in regard to which the Uniform Sales Act is more definite and certain than our present Code. Within the limits of this examination, no attempt can be made to discuss at length the merits of the particular rules of law contained in the Uniform Sales Act where our Code has no rules at all, beyond noting the fact that they are neither new nor startling, being based on common law principles as developed in actual litigation. For extended discussion on the merits of each particular rule embodied in the Uniform Sales Act, the interested reader must be referred to the treatises on the law of sales.[55]

The Uniform Sales Act contains seventy-nine sections. Of these, more than fifty deal with matters in regard to which our present Code is entirely silent. Some thirty deal, in detail, with matters on which the provisions in our Code take a more general and indefinite form, without being inconsistent with the provisions of the Uniform Sales Act. Only a few of the seventy-nine sections of the Act work substantial changes in the law already expressed in our Code. The correctness of these statements may be best demonstrated by attention to each of the sections in turn.

Specific Provisions on Matters in Regard to Which Our Code is Silent.

Acceptance under statute of frauds.—Section 4 (subdivisions 2 and 3)[56] codifies the results of much litigation, under the

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[54] See the previous article, at pp. 412-14.

[55] See Mechem on Sales, Burdick on Sales, Tiffany on Sales, and Williston on Sales. The last mentioned, Williston on Sales, is the best adapted work for use in connection with the Uniform Sales Act, since the material is collected and arranged appropriately under each section of the Act.

[56] As reference may be freely made to our Code in the recent editions of the statutes in each of the Code states, no attempt will here be made to reproduce all its language. Similarly, as reference may be made to copies of the Uniform Sales Act, it is unnecessary to waste space by repeating its provisions here, except so far as is necessary for clearness of expression. The references to our Code, in this paper, are for the different Code states as follows: Cal. Civ. Code; Revised Codes of Montana (1907); Compiled Laws of North Dakota (1913); Compiled Laws of South Dakota, vol. (1913). The references to the Uniform Sales Act are to that Act as recommended by the Commissioners and as appearing in Williston's treatise. The text of the Act is also given in the appendices to the latest editions of Burdick on Sales and Tiffany on Sales.

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Statute of Frauds, as to what is "goods" and what is a sufficient "acceptance" to satisfy the statute. The Statute of Frauds, as passed in England in 1677, required, among other things, that, for a sale of goods to be enforceable, there must have been acceptance, etc., or a memorandum in writing, if the price was ten pounds or over. Our Code substantially re-enacts the old statute in these respects, though with some variations in the different Code States as to the amount,[57] without affording much assistance as to these questions under it which have led to so much litigation. Some of our local cases[58] have, however, reached a result substantially in accord with the rule in the Uniform Sales Act.

Partial loss or deterioration.—Section 7 (subdivision 2) provides a definite rule as to how the rights of the parties are to be adjusted in cases where they have purported to sell specific goods but the goods without the seller's knowledge have partly perished or greatly deteriorated. This situation has led to considerable difficulty at common law[59] and is not provided for in our present Code. Section 8 deals with similar questions involving difficulties where there is a contract to sell specific goods, a situation equally unprovided for in our Code.[60]

Effect of conditions.—Section 11 deals with the effect of conditions in a contract to sell or a sale, and distinguishes them from warranties, which, in the proper usage of this term, are promises.[61] This inquiry is untouched in our Code.

Warranty.—Section 15 (subdivision 4) contains a well established rule at common law that, in a sale of a known, described and definite article, there is no warranty of fitness for any particular purpose.[62] On this matter our Code is silent.[63] Section

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[57] The amount in the old English statute has in most American states been translated into $50.00. Such was the amount adopted in North Dakota and South Dakota. In California and Montana, however, the amount has been fixed at $200.00. By the recent adoption of the Uniform Sales Act in North Dakota, the amount has been changed to $500.00.

[58] Jamison v. Simon (1885), 68 Cal. 17, 8 Pac. 502; Dauphiny & Co. v. Red Poll Creamery Co. (1899), 123 Cal. 548, 56 Pac. 451; Slater Brick Co. v. Shackleton (1904), 30 Mont. 390, 76 Pac. 805; Dinnie v. Johnson (1898), 8 N. D. 153, 77 N. W. 612.

[59] Williston on Sales, § 162; Mechem on Sales, § 199.

[60] See Tillson v. United States (1889), 129 U. S. 101, 32 L. Ed. 636, 9 Sup. Ct. Rep. 255; Slade v. Lee (1892), 94 Mich. 127, 53 N. W. 929; Drews v. Ann River Logging Co. (1893), 53 Minn. 199, 54 N. W. 1110.

[61] This feature is elaborately explained in Williston on Sales, §§ 180-181.

[62] Pullman's Palace Car Co. v. Metropolitan Street Ry. Co. (1895), 157 U. S. 94, 39 L. Ed. 632, 15 Sup. Ct. Rep. 503; Peoria Grape-Sugar Co. v.

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15 (subdivision 5) specifies that a warranty of quality may be annexed by the usage of trade. It would seem that this result would be universally accepted on common law principles of contract, the usage showing what the intention of the parties must have been. Unfortunately, the actual litigation on the question has led to much disagreement.[64] On this question, too, our Code is silent. Section 15 (subdivision 6) settles the question that an express warranty does not exclude an implied warranty unless inconsistent. This is in accord with the better view at common law, there being nothing in the mere fact that a promise in regard to one matter is exacted to indicate that other promises, which would be understood in the ordinary course, are thereby excluded. On this question, however, there is much conflict of authority in the cases[65] and on it, again, our Code is silent.[66] Section 16 (subdivision c) established the wholesome rule that the warranty in a case of a sale by sample implies not merely that the goods are like the sample, but that, where the seller is a dealer in that kind of goods, they are free from defects rendering them unmerchantable which would not be apparent on a reasonable examination of the sample. Common

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Turney (1898), 175 Ill. 631, 51 N. E. 587; Ehrsam v. Brown (1907), 76 Kan. 206, 91 Pac. 179; Franklin Mfg. Co. v. Lamson & Goodnow Mfg. Co. (1905), 189 Mass. 344, 75 N. E. 624.

[63] Some of our local cases tend in the same direction. See, for example, Davis v. Iverson (1894), 5 S. D. 295, 58 N. W. 796; and especially Bancroft v. San Francisco Tool Co. (1898), 120 Cal. 228, 52 Pac. 496; Mannix v. Tryon (1907), 152 Cal. 31, 91 Pac. 983; Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co. (1908), 153 Cal. 725, 96 Pac. 369.

[64] See, for example, Barnard v. Kellog (1870), 10 Wall. 383, 19 L. Ed. 987; Bevine v. Dord (1851), 5 N. Y. 95, 55 Am. Dec. 321; Witherill v. Neilson (1853), 20 Penn. St. 448; Chicago Package Co. v. Tilton (1877), 87 Ill. 547; Sumner v. Tyson (1850), 20 N. H. 384; Jones v. Bowden (1864), 4 Taunt. 847.

[65] Williston on Sales, § 239, and Mechem on Sales, §§ 1259-1260, cite numerous authorities on each side of this proposition.

[66] In the Code states the cases that have touched on the question have not been in harmony. A dictum in Kullman, Salz & Co. v. Sugar Apparatus Mfg. Co. (1908), 153 Cal. 725, 96 Pac. 369, states without reservation that implied warranties are merged in the written contract. In North Alaska Salmon Co. v. Hobbs, Wall & Co. (1911), 159 Cal. 380, 120 Pac. 27, however, the view taken in the Uniform Sales Act is followed. Contrary to the view taken in the Uniform Sales Act, without discussion on the merits, is Sheafe v. Zashow (1912), 30 S. D. 159, 138 N. W. 16. In Montana no cases apparently have expressly dealt with the question. The North Dakota cases are in accord with the view taken in the Uniform Sales Act. See Dowagiac Mfg. Co. v. Mahon (1904), 13 N. D. 516, 101 N. W. 903; Hooven v. Wirtz (1906), 15 N. D. 477, 107 N. W. 1078; Comptograph Co. v. Citizens Bank (1915), 32 N. D. 59, 155 N. W. 680.

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law authorities support this view[67] but on it there is nothing in our Code.

Rules for ascertaining intention.—Section 19 contains a number of definite rules for ascertaining the intention of the parties, where there is nothing in the transaction showing it affirmatively, as to whether title is to pass. This is a matter upon which there is an immense amount of conflicting litigation.[68] It is a matter, too, which is of great importance, since, very often, the parties do not think of the particular moment at which they want title to be transferred, but that fact later turns out to be decisive as to their rights when the goods have been lost or deteriorated before the parties have entirely completed their transaction. In such cases, of course, the loss, unless otherwise stipulated, or shifted by the fault of either, must fall upon the one who was owner when the loss occurred. As they did not arrange particularly about the matter beforehand, after the loss occurs each is likely to insist that the other is the owner. The general rule

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[67] Nusserwanjee Bomanjee Mody v. Gregson (1868), L. R. 4 Ex. 49; Heilbutt v. Hickson (1872), L. R. 7 C. P. 438; Drummond & Sons v. Van Sugen Co. (1887), L. R. 12 App. Cas. 284; Bierman v. City Mills Co. (1897), 151 N. Y. 482, 45 N. E. 856, 37 L. R. A. 799.

[68] As an example see n. 49, supra, on the case law situation in regard to the effect of unascertained price on the passing of title.

Another important example is afforded by the question of the effect of a C. O. D. provision on the passing of title. That the American common law authorities on this question are much in conflict, see Williston on Sales, § 345; Mechem on Sales, §§ 740, 793, 794, and notes, especially note to Mechem, § 740, containing a considerable compilation of authorities. For some further interesting cases on the question, see Adair v. Commonwealth (1906), 89 S. W. 1132, and Cheadle v. Roberts (1911), 150 Iowa 639, 130 N. W. 368.

The question has been most elaborately litigated in cases of liquor shipments into dry territory. By the ordinary rule of law that title passes on delivery to the carrier, if the shipment is in accordance with the order, the title to the liquor passes when it is shipped by the seller in wet territory. What happens thereafter is then not a violation of the prohibition laws, unless the liquor is re-sold, a fact often hard to prove. Such has been the holding in the majority of states where the question has been litigated, the courts thinking that there was no basis for inferring any other than the ordinary intent as to the passing of title from the mere fact that the goods were marked C. O. D. Such restrictions as to delivery has been held to indicate merely an intent on the part of the seller to insist upon his seller's lien.

The importance of the question, from the standpoint of inforcement or evasion of the prohibition laws, has been considerably diminished by the Federal Statutes. (U. S. Comp. St. 1913, § 10409), which prohibits railway companies, express companies, etc., from collecting on or after delivery in case of liquor shipments over state lines, and makes violations of that prohibition subject to heavy fine. The Federal Statute, however, does not directly touch the question of title to the liquors in the course of such shipments.

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is recognized that title passed in a sale if the parties intended that it should; but without affirmative evidence on what that intent was, presumptions must be resorted to. What those presumptions are to be, in different circumstances frequently arising, it is needful to have specified definitely in order to be able to settle such common cases without too much long-continued and expensive litigation. The Uniform Sales Act specifies these presumptions. The cases show much conflict of authority in them and in our Code there is nothing at all.[69]

Mercantile theory of documents of title.—Section 20 (subdivisions 2, 3 and 4) and sections 27-40 establish the law of documents of title—i. e., bills of lading and warehouse receipts, in accordance with what is called the "mercantile" theory, as opposed to the "common law" theory of such documents. Both theories have much support in decided cases, though the mercantile theory is probably becoming more firmly established, while the common law theory is waning.[70] By the so-called common law theory of documents of title, the form of the document is prima facie evidence of the title to the goods for which the document was issued. Other circumstances may, however, by this theory, be brought in to contradict the document and show that title to the goods was really elsewhere than in the persons indicated by the document, just as other circumstances than possession may show that title to ordinary chattels is in others than the possessor. Such a process, always permissible when the question is raised only between the original parties, if still permissible after the document has been transferred to a bona fide purchaser, makes such documents unsatisfactory as commercial documents on the faith of which to advance money. To facilitate the use of such documents in the business world, either

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[69] For determining the questions of whether title passed or not, our Code contains merely the general statement that title passes whenever the parties agree upon a present transfer. See Cal. Civ. Code, § 1140; Revised Codes of Montana (1907), § 4632; Compiled Laws of North Dakota (1913), § 5535; Compiled Laws of South Dakota (1913), Civ. Code, § 950. This provision leaves the question open, for it frequently happens that the parties did not advert, at the time, to the particular moment when they intended title to pass.

[70] This is especially true since the mercantile theory was adopted in the Uniform Sales Act, the Warehouse Receipts Act, and the Bills of Lading Act, and these Acts have been adopted in more and more states. At the last reports (June, 1917) the Warehouse Receipts Act had been adopted in forty states, while the Bills of Lading Act had been adopted in twenty-one states, and had also been adopted by the Federal Congress.

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for use as security for advances while the goods are in transit or storage, or for ready sale of such goods in the interim by a negotiation of the document, the document itself must be more conclusive. By the mercantile theory of documents of title, adopted in many courts, the form of the document is conclusive and transferees may take it, relying on the showing it presents as to who is the owner. By this means, a great deal of business can be done without the necessity of tying up the amount of capital represented by the value of the goods shipped or stored during the period of transit or storage. The considerations applying here for making these documents more negotiable are thus analogous to those applying in the case of ordinary commercial paper—i. e., bills, notes, and checks. The mercantile theory of documents of title is adopted also in the Uniform Warehouse Receipts Act, which has now (1917) been enacted into law in all four of the Code States. The corresponding sections of the Uniform Sales Act would, therefore, so far as warehouse receipts are concerned, work no change. The effect upon the law of bills of lading would be to clarify what is probably in our Code already but is inconclusive, owing to the general language of the Code provisions and the strict construction identical language has elsewhere received. While our Code has purported to make such documents negotiable,[71] the language is very general and is like similar language in statutes of many other states which have been so narrowly construed that their effect is to leave the documents transferable, as under the common law theory, but not negotiable in the sense of protecting a transferee for value without notice beyond the protection extended in a similar transfer of ordinary chattels.[72] Our local law on the subject, if without decided cases in point, is therefore inconclusive.[73] In order to establish the negotiability of such docu-

[71] Cal. Civ. Code, §§ 2127-28; Revised Codes of Montana (1907), §§ 6210-11; Compiled Laws of South Dakota (1913), Civ. Code, §§ 1552-53.

[72] Shaw v. Railroad Co. (1879), 101 U. S. 557, 25 L. Ed. 892; Barnum Grain Co. v. Great Northern Ry. Co. (1907), 102 Minn. 147, 112 N. W. 1030, 1049; Commercial Bank v. Hart (1892), 99 Ala. 130, 12 So. 568; Turner v. Israel (1897), 64 Ark. 244, 41 S. W. 806; Garwood v. Haffy (1897), 18 Wash. 246, 51 Pac. 461; Hale v. Milwaukee Dock Co. (1872), 29 Wis. 482. In a few cases a wider construction of such statutes has been given. See Hardie v. Vicksburg Ry. Co. (1903), 118 La. 254, 42 So. 793; Tiedeman v. Knox (1880), 53 Md. 612.

[73] This seems to be the case, apart from the Uniform Acts, in Montana, North Dakota, and South Dakota. In California the cases seem to have held that a bill of lading is not negotiable, but have not directly dealt

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ments of title in accordance with the mercantile theory, to make it safe to advance money on such bills of lading either for purchase or loan on security, we need the specific provisions carrying this doctrine into effect which are contained in the Uniform Sales Act.[74]

Auctions.—Section 21 (subdivision 1) states, in statutory form, what is abundantly clear on principle and authority,[75] that where goods are put up for sale by auction, in lots, each lot is the subject of a separate contract of sale. On this point our Code is silent.

Sale by a person not the owner.—Section 23 (subdivision 1) states the fundamental doctrine of the law of property that no one can give what he has not. This doctrine, assumed but nowhere expressly stated in our code,[76] is recognized in some of our cases.[77]

Sufficiency of delivery.—Section 43 (subdivision 3) provides a definite rule as to what is to be regarded as sufficient delivery in case of sale of goods in the possession of third parties, a question which has caused considerable confusion.[78]

Delivery of wrong quantity.—Section 44 provides definite rules as to how the obligations of sellers and buyers are effected by delivery of a wrong quantity of goods. Definite rules, ascertainable in advance of litigation, to enable parties to adjust their

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with the effect of this local statute in that regard. See Tineker v. Ayeshford (1850), 1 Cal. 76, 79; Dodge v. Meyer (1882), 61 Cal. 405; Cavellero v. Texas & Pac. Ry. Co. (1895), 110 Cal. 348, 42 Pac. 918.

[74] For detailed examination of the merits of each of the sections of the Uniform Sales Act bearing on the mercantile theory of documents of title and the authorities involved in regard to each, see Williston on Sales, §§ 405-444.

[75] See Emmerson v. Heelis (1809), 2 Taunt. 38; Wells v. Day (1878), 124 Mass. 38; McManus v. Gregory (1888), 94 Mo. 370, 7 S. W. 423. See further the discussion of this question in Williston on Sales, § 295.

[76] Cal. Civ. Code, § 1083; Revised Codes of Montana (1907), § 4609; Compiled Laws of North Dakota (1913), § 5508; Compiled Laws of South Dakota (1913), Civ. Code, § 935.

[77] See Alexander v. Jackson (1891), 92 Cal. 514, 28 Pac. 593, 27 Am. St. Rep. 158; Rosenbaum v. Foss (1895), 7 S. D. 83, 63 N. W. 538. A similar trend, but without such specific averment, may be frequently observed in other cases also, as for example in Curtin v. Kowalsky (1904), 145 Cal. 432, 78 Pac. 962; Eise v. Merchant's National Bank (1887), 4 Dak. 405, 33 N. W. 897; North Dakota Cattle Co. v. Serumgard (1908), 17 N. D. 466, 1177 N. W. 453; Parker v. Randolph (1894), 5 S. D. 549, 59 N. W. 722.

[78] See the discussion and authorities cited in Williston on Sales, § 454. On this point the California cases seem to have reached a position substantially in accord with the Uniform Sales Act. See Ghirardelli v. McDermott (1863), 22 Cal. 539; Schurtz v. Romer (1890), 82 Cal. 474, 23 Pac. 118.

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dealings and controversies are in this particular very important, since it often happens that the amounts delivered or tendered do not tally exactly with the amounts bargained for, and it is the uncertainty as to the legal effect of such discrepancies that leads to controversy and often leads to long-continued and expensive litigation. On this again, our Code is entirely silent.[79]

Delivery in installments.—Section 45 provides, in statutory form, a rule, applying generally to contracts, for the effect of delivery in installments. As the question is one involving the construction of the contract the parties have made, the general rules stated are likely not to do away entirely with disputes as to their application.[80] Even granting that, however, it is better to have a rule for disposing of such cases than to have to find a rule only at the end of a long course of litigation, as is now necessary, for our Code is entirely silent on the question of delivery in installments under a contract to sell or a sale.[81]

Right of inspection.—Section 47 (subdivision 3) establishes that, where the carrier is to collect on delivery of the goods, the buyer has no right of inspection until after he has paid. This provision is in accord with decided cases[82] but we have nothing on the point in our local law.

What constitutes acceptance.—Section 48 defines what constitutes acceptance of goods under a contract of sale, as intimation of acceptance, exercising acts of ownership, or retaining the goods. The inquiry whether the buyer has accepted the goods often becomes material, both under the Statute of Frauds, as a satisfaction of the statute, and under any inquiry whether the contract has been performed. It is therefore desirable to have the law settled in regard to what amounts to acceptance of the goods under the contract of sale. Here, again, our Code,

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[79] California cases again substantially accord with the rule in the Uniform Sales Act. See Willamette Co. v. Union Lumber Co. (1892), 94 Cal. 156, 29 Pac. 773; Ontario Ass'n v. Cutting Packing Co. (1901), 134 Cal. 21, 66 Pac. 28, 53 L. R. A. 681, 86 Am. St. Rep. 231; Inman v. White Lumber Co. (1901), 14 Cal. App. 551, 112 Pac. 560; Fleming v. Law (1915), 28 Cal. App. 110, 151 Pac. 385. In the other three Code states the particular questions seem not yet to have reached the Supreme Courts for decision.

[80] For some litigation under these rules see n. 13 in later article.

[81] The result reached in Wood, Curtis & Co. v. Scurich (1907), 5 Cal. App. 252, 90 Pac. 51, accords with this provision of the Uniform Sales Act.

[82] Wilste v. Barnes (1877), 46 Iowa 210. For a considerable list of citations on this general question see 10 C. J. 279-280.

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is silent,[83] but the Uniform Sales Act contains a definite rule which may be ascertained in advance of litigation.

Acceptance as related to action for damages.—Section 49 provides that acceptance of the goods does not bar action for damages if the goods do not correspond with the requirements of the contract. It thereby settles a question which is involved in much conflict of authority at common law. Several cases in the Code States are in accord with the view adopted in the Uniform Sales Act.[84]

Wrong delivery.—Section 50 expresses a well-settled rule at common law, that the buyer is not bound to return goods wrongly delivered.[85] Our Code, however, is silent on the question. Similar remark may be made on Section 51, covering the buyer's liability for failure to accept delivery.[86]

Definition of unpaid seller.—Section 52, a definition of unpaid seller, is new to our Code. It is defined in the Uniform Sales Act for the sake of accuracy in dealing with the subsequent sections giving the remedies of an unpaid seller.

Lien after part delivery.—Section 55, providing for the unpaid seller's lien after part delivery, covers an important matter in regard to which the Code is silent.

When lien is lost.—Section 56, providing how the unpaid seller may lose his lien, by delivery, waiver, etc., is also a specific provision in accordance with common law principles and authority on matter in regard to which our Code is entirely silent.

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[83] On this point California cases accord with the position taken in the Uniform Sales Act. See Walden v. Murdock (1863), 23 Cal. 540, 83 Am. Dec. 435; Coneigo v. Lynch (1884), 65 Cal. 273, 3 Pac. 889; Merehin v. Ball (1885), 68 Cal. 205, 8 Pac. 886; Jackson v. Porter Land Co. (1907), 151 Cal. 32, 90 Pac. 122; Sherman v. Ayres (1912), 20 Cal. App. 733, 130 Pac. 163; United Motor Co. v. Callander (1916), 30 Cal. App. 41, 157 Pac. 561.

[84] See Wheelock v. Pacific Pneumatic Car Co. (1876), 51 Cal. 223; Browning v. McNear (1904), 145 Cal. 272, 78 Pac. 722; Jackson v. Porter Land Co., supra, n. 83; Jackson Machine Works v. Duff (1910), 158 Cal. 47, 109 Pac. 616; Hillman v. Luzon Cafe Co. (1914), 49 Mont. 180, 142 Pac. 641; Northwestern Cordage Co. v. Wright (1896), 5 N. D. 432, 67 N. W. 298; International Society v. Hildreth (1902), 11 N. D. 262, 91 N. W. 70.

[85] See, for example, Alden v. Hart (1894), 161 Mass. 576, 37 N. E. 742; Doane v. Dunham (1872), 65 Ill. 512; Mulcahey v. Diendonne (1908), 103 Minn. 176, 115 N. W. 636.

[86] On this point California cases accord with the Uniform Sales Act. See Blanchard v. Pac. Rolling-Mill Co. (1894), 4 Cal. Unrep. 619, 36 Pac. 584; Gay v. Dare (1894), 103 Cal. 454, 37 Pac. 466.

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When goods are in transit.—Section 58, defining in detail when goods are held to be in transit for the purposes of the law of stoppage in transit, is very much more complete than our Code, for it is based on decided cases[87] involving various circumstances not dealt with in our Code at all.

No right to stop against transferee of documents for value without notice.—Section 59 (subdivision 2) and Section 62 affirmatively provide for the protection of a bona fide transferee of an order bill of lading after an unpaid seller's notice to the carrier to stop the goods. This is in accord with the mercantile doctrine of bills of lading, already set out in sections 27-40. On this question, our present Code contains nothing definite. In California, the cases have already reached the position now embodied in the Uniform Sales Act.[88]

Effect of sales of goods subject to lien or stoppage in transit.—Section 62, in providing that a sale of the goods by the buyer while they are in transit shall not cut off the seller's right to stop them, is stating a generally accepted rule[89] about which our Code is silent. The last part of the section, protecting the transferee of an order bill of lading under such circumstances, while involved in some conflict of authority at common law,[90] expresses the view already reached in California cases, which is correct on principle, in accordance with the mercantile theory of bills of lading adopted in the Uniform Sales Act.

Action for the price.—Section 63 (subdivision 2) expresses what is undoubted common law,[91] though our Code is silent on the subject, that if the contract makes the price payable on a certain day, irrespective of transfer of title or delivery, the seller may recover the price, according to the terms of the contract,

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[87] See the extended discussion and numerous authorities cited in Williston on Sales, §§ 523-539.

[88] Newhall v. Central Pacific R. R. Co. (1876), 51 Cal. 345, 21 Am. Rep. 713.

[89] See, for example, Keeler v. Goodwin, 111 Mass. 490; Anderson v. Read (1887), 106 N. Y. 333, 13 N. E. 292.

[90] On this question California has held that the transferee is to prevail. See Newhall v. Central Pacific R. R. Co., supra, n. 88. This view, correct on principle, is opposed by the weight of authority. See Williston on Sales, § 542; Mechem on Sales, § 1567; Burdick on Sales, p. 236, and authorities cited. The best discussion on principle is found in Williston, sustaining the California case and taking issue with Burdick and Mechem who approve the weight of authority.

[91] See, for example, White v. Solomon (1895), 164 Mass. 516, 42 N. E. 104.

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unless he manifests inability to perform or shows an intention not to perform. Such contracts are rare, apart from contracts of conditional sale, which are well known and constantly enforced by the courts.[92]

Remedies for breach of warranty.—Section 69 specifies far more completely than our Code the buyer's remedies for the seller's breach of warranty. Yet with the exception of one subdivision, (1) (d), it is consistent with the general provisions found in our Code.[93] In parts, it goes into much detail in regard to features as to which the present Code is entirely silent, as in subdivisions (3), (4), and (5). In regard to subdivision (1) (d), which works a change in the Code, see below.[94]

Effect of Uniform Sales Act on right to recover interest and special damages.—Section 70 contains the provisions that the enactment of the Uniform Sales Act shall not affect the right to recover interest or special damages in any case where by law they may be recoverable. This is to guard against any undesigned change in other parts of the law as a consequence of the enactment of the Uniform Sales Act.

Interpretation.—Section 71-73 contain various rules of interpretation of the Act itself, quite in accord with accepted principles. Section 75 provides that the provisions of the Uniform Sales Act are not, unless so stated, applicable to mortgages. It was thought best not to attempt to deal with the peculiar rules of mortgage law, as such, in connection with the Uniform Sales Act, but to leave them to be dealt with, if so desired, by independent legislation. Section 74 provides that the Uniform Sales Act is to be so interpreted as to give effect to the purpose of uniformity. This principle is indispensable if the purpose of uni-

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[92] Conditional sales are recognized as a matter of course in the Code States as they are in other states generally. See, for example, Parke and Lacy Co. v. White River Lumber Co. (1894), 101 Cal. 37, 35 Pac. 442; Van Allen v. Francis (1899), 123 Cal. 474, 56 Pac. 339; Rock Island Plow Co. v. Western Implement Co. (1911), 21 N. D. 608, 132 N. W. 351; Goodale v. Wallace (1905), 19 S. D. 405, 103 N. W. 651.

It is proper here to notice that the Uniform Sales Act does not attempt to deal generally with the many intricate and difficult questions arising upon conditional sales. The whole subject of conditional sales is to be dealt with by the Commissioners on Uniform State Laws in a proposed Uniform Conditional Sales Act, which is now in preparation.

[93] See Cal. Civ. Code, §§ 3312-14; Revised Codes of Montana, §§ 6060-62; Compiled Laws of North Dakota, §§ 7157-59; Compiled Laws of South Dakota, Civ. Code, §§ 2304-06.

[94] See later article, "Changes in our Present Code, ... The Law of Warranty."

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formity is to be consistently carried out,[95] and has already won recognition from several courts, including the Supreme Court of the United States.[96] Section 76 provides a list of definitions of terms used in the Act itself. In this respect the Uniform Sales Act follows the example set in the National Bankruptcy Act, in the Negotiable Instruments Law, and in other statutes, defining its own terms, so far as possible, to prevent confusion as to what they mean. In regard to these definitions in the Uniform Sales Act, little or no question has been raised, except in the case of the definition of "value", the effect of which is considered below.[97]

Provisions Making More Specific Various Matters Already Contained in our Code.

Lack of adequate space in an article of the present character does not permit any detailed discussion of the merits of these provisions. For such discussion, the reader is referred to the treatise.[98] The Uniform Sales Act, in dealing with them, is better, since its provisions are more specific, are more easily applied and are more successful in avoiding litigation.

What the provisions are which substantially correspond may best be indicated by bringing them together in parallel columns. Where the provisions of the Uniform Sales Act not only make more specific what is already expressed in general terms in our Code, but also set out rules of law on matters in regard to which our Code is silent, they have in the main been already dealt with above. Where they produce or are likely to be alleged to produce affirmative changes in our law, they are dealt with below. The following presentation of corresponding similar provisions is believed to be substantially correct, it being understood that the provisions of the Uniform Sales Act are usually more specific.

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[95] See Williston on Sales, § 617.

[96] See footnotes 13, in later article for cases decided under section 74 of the Uniform Sales Act.

[97] A discussion of doubtful cases will be presented in a later article.

[98] See n. 55.

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UNIFORM SALES ACT	CALIFORNIA	MONTANA	NO. DAKOTA	SO. DAKOTA
Sec. 1 and 9	1805	5130	6004	1349
" 3	1621-22	5014-15	5885-6	1235-6
" 4 (2)	1740	5090	5962	1310
" 5	1722 and 1730	5080 and 5085	5951 and 5956	1300 and 1305
" 6	1140	4632	5535	950
" 7 (1)	1577 and 1596	4983 and 4997	5854 and 5868	1206 and 1220
" 9 (2)	1806	5131	6005	1350
" 9 (4)	1611	5007	5878	1230
" 12	1763	5103	5973	1322
" 13 and 14	1772	5112	5982	1331
" 13	1777	5117	5987	1336
" 13	1765	5105	5975	1324
" 15	1764	5104	5974	1323
" 15 (1) (2)	1771	5111	5981	1330
" 16 (a)	1766	5106	5976	1325
" 17 and 18	1140	4632	5535	950
" 20 (1)	2127, part 2128	5315-16 (part)	6210-11 (part)	1552-53 (part)
" 21 (2)	1793-94 and -96	5123-24 and -26	5996-97-99	1342-43 and -45
" 21 (4)	1797	5127	6000	1346
" 22	1755	5099	5969	1318
" 26	3440 (part)	6128 (part)	7221 (part)	2369 (part)
" 27-29	2126-28	5314-16	6209-11	5151-53
" 42	1784	5119	5989	1338
" 43 (1)	1754-55	5098-9	5968-9	1317-18
" 43 (2) (5)	1753	5097	5967	1316
" 43	1756	5100	5970	1319
" 43 (4)	1758	5102	5972	1321
" 46	1757	5101	5971	1320
" 47	1785	5120	5990	1339
" 53 and 54	1748	5095	5965	1313
" 54	3049	5803	6864	2151
" 53 (2)	3049 and 3076	5803 and 5837	6864 and 6881	2151 and 2163
" 57	3076	5837	6881	2163
" 58	3078	5839	6883	2165
" 59	3079	5840	6884	2166
" 61 (1), 65	1749	5096	5966	1314
" 61 (2)	1691	5065	5936	1285
" 63 (1)	3310	6058	7155	2302
" 64	3300-01, 3311	6048-49, 6059	7146, 7156	2293, 2303
" 68	3380, 3384, 3386	6095, 6096, 6098	7191-93	2338-40
" 69 (6) (7)	3312-14	6060-62	7157-59	2304-06

Some provisions embody the rules contained in our Code in substantially the same form. Comments on these provisions are for the present purpose obviously unnecessary. The provisions need only be brought together in parallel columns.

UNIFORM SALES ACT	CALIFORNIA	MONTANA	NO. DAKOTA	SO. DAKOTA
Sec. 1.	1721, 1726-9	5079, 5081-4	5950, 5952-5	1299, 1301-4
53 (a), 53 (d)	1749	5096	5966	1314
53 (b) 57	3076	5837	6881	2163

The provisions which make substantial changes in our Code are very few in number and are considered in a later article. It seems clear that in most cases these changes are not radical but are in accord with common law principles and are usually desirable changes to make on their own merits.

Lauris Vold.

University of North Dakota,
Grand Forks, North Dakota.

(TO BE CONTINUED)

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CORRESPONDENCE.

New York, July 31, 1917.

EDITOR CALIFORNIA LAW REVIEW,

SIR:

In answer to Dean Henry W. Ballantine's Military Dictatorship (1 California Law Review, 413) I beg to say:

During a national war with any first class power, the federal Constitution does not inure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign. All spies should be forthwith tried by court-martial and, if convicted, shot.[1] Enemy sympathizers, after conviction by court-

[1] U. S. Rev. Stats., § 1343.

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martial, should be either confined at hard labor during the war, or else should be deported to the enemy country as was Vallandigham.

In 1863, Vallandigham, the state leader of a great party in Ohio, publicly sympathized with the confederacy. Ohio was not at that time invaded. The courts were open. Vallandigham was tried by court-martial, was convicted of sedition and of sympathizing with the confederacy, and was sentenced to confinement in a fortress during the war. The Supreme Court refused to interfere.[2] By way of commutation of sentence he was then deported to the confederacy.

In 1904, Peabody, then Governor of Colorado, declared a county to be in a state of insurrection and ordered one Moyer to be arrested as a leader of the outbreak and detained by the national guard until he could be safely discharged, and then to be delivered to the civil authorities. This was done purely as a military arrest, without any civil process. It does not appear that the civil courts in the county were closed during the insurrection. After the termination of the insurrection, Moyer sued the former Governor, the former adjutant general of the national guard, and the captain of the company which arrested and confined him, for an alleged wrongful imprisonment. The Supreme Court unanimously upheld the acts of the Governor and the militia.[3]

In 1901, during the Boer war, a South African was arrested by order of the military authorities, removed 300 miles from his home and confined in a civil jail, by order of the military, in a district in which martial law prevailed although the civil courts remained open. The Privy Council upheld the arrest and confinement.[4]

In 1902, during the Boer war, convictions of imprisonment at hard labor and fines under martial law by an administrator of martial law for acts contravening martial law regulations against sedition and unlawful travel and removal were upheld, though made by the same person who was also the civil magistrate and whose civil court was open at the time.[5]

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[2] Ex parte Vallandigham (1863), I Wall. 243, 17 L. Ed. 589.
[3] Moyer v. Peabody (1909), 212 U. S. 78, 53 L. Ed. 410, 29 Sup. Ct. Rep. 235.
[4] Ex parte Marais, L. R. (1902), A. C. 109.
[5] Atty. Genl. v. Van Reenen, L. R. (1904), A. C. 114.

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In 1914, a New Zealand reserve officer, not in actual service, went to Samoa after its capture and after all German resistance had ceased, and violated war regulations by exporting gold coin from Samoa, carrying personal letters from German prisoners there to their friends interned in New Zealand, and carrying photographs of a captured German wireless station as well as manuscript for the editors of two New Zealand papers. He was taken back to Samoa, tried there before a military court, convicted and sentenced to five years imprisonment in New Zealand. The New Zealand Supreme Court upheld the conviction and sentence.[6]

In 1915, a South African was arrested for violating a martial law regulation forbidding seditious language and was held for trial before a special military court. The Boer rebellion in South Africa did not break out until after the alleged sedition was committed and the civil courts remained open. The Supreme Court of South Africa refused to inquire into the matter or to restrain the military court from trying all those charged with violating the martial law regulations, notwithstanding the fact that the civil courts remained open.[7]

In 1914, an Australian statute authorizing the detention and confinement in military custody, during the war, of any naturalized person whom the Minister of Defense believed to be disaffected or disloyal, without the production of any evidence whatever, was upheld on the principle of the necessity of a dictatorship during a national war.[8]

In 1818, after the Mahratta Government at Poona had been overthrown, the Peishwa (or native absolute sovereign) surrenddered and his country was conquered. Lord Elphinstone, the commissioner commanding the occupied territory, seized the treasure and account books in the custody of the late treasurer of the native government. Hostilities had ceased and the civil and criminal courts of the East India Company were open. The treasurer's executors recovered judgment for what the Municipal Court of Bombay held was the private property or private treasure of the native ruler, as well as the treasurer's own prop-

[6] In re Gaudin, 34 N. Z. Rep. 401.

[7] Krohn v. Minister for Defence, South African L. R. (1915), App. Div. 191, 197-212.

[8] Lloyd v. Wallach (1914), 20 Commonwealth L. R. 299.

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erty, which had been mingled with the private treasure. The Privy Council held that no civil court had jurisdiction, that recourse could only be had to the Government of India for redress.[9]

The Milligan case referred to by Dean Ballantine,[10] is not in point. The only question actually there decided was the legal but not constitutional question that the statute relied upon as a basis for the military courts did not in fact give authority to establish them in the places where they were set up.

Stieber, the chief of the Prussian spies in the wars of 1866 and 1870, says in his memoirs that, in the presence of von Bismarck, he told an officer of the Prussian General staff that his invisible army of 30,000 Prussian spies was as much a Prussian army as the visible and much larger fighting army of von Moltke, and that von Bismarck tacitly admitted it.[11]

The militaristic feudalism which has wantonly attacked us in the course of its struggle for world power or downfall, justifies its attempt to conquer the world by asserting that all free governments are disintegrating; that all free peoples are either corrupt, decadent or degenerate; that treaties, international law and constitutions are all alike nothing but scraps of paper; that feudalism with its war lords, Krupps, spies and cannon fodder is so superior to all free governments and all free people that it is above all laws, divine, international or human; also it asserts that no free government or free people have any rights which feudalism is bound to respect.

Any who assert that the Federal Constitution inures to the benefit of spies, secret agents of or sympathizers with the public enemy, must claim that the framers intended the Constitution to aid feudalism to conquer freedom. Any who assert that the spies of and sympathizers with a public enemy who desires to conquer and plunder us, as Cortez did to Mexico and Pizarro did to Peru, are entitled to the protection of the Constitution, must believe that the Constitution intended to limit and restrict the war power so as to deprive the nation of all means of defence.

Henry A. Forster.

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[9] Elphinstone v. Bedrechund (1818), 1 Knapp 316.
[10] In re Milligan (1866), 4 Wall. 2, 18 L. Ed. 281.
[11] Lanoir, German Spy System in France, 70-72.

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Comment on Recent Cases

ADMIRALTY JURISDICTION: "SAVING A COMMON LAW REMEDY."—Assuming that Congress has not already, pursuant to its undoubted constitutional right to do so,[1] excluded state action in the matter of injuries to seamen on the high seas by federal enactments covering the same field of legislation, the question remains whether or not the remedy given by the California Workmen's Compensation Act provides a "common law remedy" within the meaning of the saving clause of the Judiciary Act of 1789.[2] In *North Pacific Steamship Company v. Industrial Accident Commission of California*[3] this question was answered in the affirmative.

With this assumption in mind, the view is submitted that, although the state could not go to the length of making its remedy exclusive and thus deny to seamen the right to proceed in the admiralty courts, Congress by the term "common law remedy" merely wished to make clear that the state courts still had the right to apply all remedies except the one peculiar to the admiralty courts, namely, the proceeding in rem against the vessel. It therefore follows that the saving clause includes all remedies in personam, and excludes only such remedies as are in rem. That this is the law is borne out by numerous dicta[4] and by certain decisions in situations practically identical with the present;[5] but it still remains for the Supreme Court of the United States to decide in the matter of a remedy afforded by a compensation act.

On the other hand, however, there has been advanced the ingenious argument that the intention of Congress was to preserve to suitors the privileges afforded in a common law action, chief of which was the right to a trial by jury, and that the remedy given by the Workmen's Compensation Act, calling for a special proceeding without a jury trial, is, therefore not a common law remedy within the meaning of the saving clause.

The narrow interpretation of the words "common law remedy"

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[1] U. S. Const., Art. III, § 2; In re Garnett (1890), 141 U. S. 1, 35 L. Ed. 631, 11 Sup. Ct. Rep. 840.

[2] Act of Sept. 24, 1789, c. 20, § 9, 1 Stats. at L. 76 (giving to the District Courts exclusive admiralty and maritime jurisdiction, "saving to suitors in all cases the right of a common law remedy where the common law is competent to give it").

[3] (Feb. 3, 1917), 53 Cal. Dec. 170.

[4] Leon V. Galceran (1870), 11 Wall. 185, 20 L. Ed. 74; Johnson v. Westerfield (1911), 143 Ky. 10, 135 S. W. 425.

[5] See post, n. 8.

[6] Aurora Shipping Co. v. Boyce (1911), 191 Fed. 960; The Hamilton (1907), 207 U. S. 398, 52 L. Ed. 264, 28 Sup. Ct. Rep. 133.

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which is adopted in this apparently formidable argument might possibly form the basis for still further restricting the jurisdiction of the state and of the state courts to such remedies as were known to the common law system unaffected by statute, or, at least, to such remedies only as were known to the common law at the time of the passage of the Judiciary Act. Such a narrow view cannot, however, at this date be entertained. The various state death statutes, for example, giving causes of action which were entirely unknown to the common law, have been consistently upheld and enforced even in the admiralty courts.[6] The only cases where acts have been held unconstitutional are those where the remedy which the state attempted to give was enforcible in rem by the state courts.[7]

These death statutes, although providing a remedy unknown to the common law, nevertheless, retained the right to a jury trial, and were enforcible in the common law courts. The cases, however, have gone further, and by the weight of authority suits in equity are held to be within the purview of the saving clause.[8] These decisions would appear strongly persuasive in the principal case, since the so-called distinguishing feature of a common law action, trial by jury, is absent in both suits in equity and in proceedings before industrial commissions.

Apart, however, from authority, it seems reasonable to hold in accordance with the general understanding that it is a remedy enforcible in personam as opposed to the admiralty proceeding in rem, which is saved. The statute reserves a common law remedy, not an action at common law, and it would be idle to deny that the common law remedy of carriers to retain possession for freight is not preserved to the state courts simply because it does not involve a trial by jury. The conclusion follows that a "common law remedy," as employed by the Judiciary Act, means any remedy, not the maritime libel in rem, whether with or without action or jury, whereby a liability is imposed after due process of law. It would therefore undoubtedly appear that the remedy given under the Workmen's Compensation Act to seamen on domestic ships for injuries occurring on the high seas is within the saving clause, and part of the state's concurrent jurisdiction.

J. F. R.

ADMIRALTY JURISDICTION: TORTS: THE LOCALITY TEST.—It was formerly a dogma of the bench and bar that in regard to torts the jurisdiction of the admiralty courts depended altogether on the locality where the tort occurred, and it was generally assumed

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[7] The Moses Taylor (1866), 4 Wall. 411, 18 L. Ed. 397; The Hine v. Trevor (1866), 4 Wall. 555, 18 L. Ed. 451.

[8] Knapp, Stout & Co. v. McCaffrey (1889), 177 U. S. 638, 44 L. Ed. 921, 20 Sup. Ct. Rep. 824; Soper v. Manning (1888), 147 Mass. 126, 16 N. E. 752; Reynolds v. Nielson (1903), 116 Wis. 483, 93 N. W. 455, 96 Am. St. Rep. 1000.

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that, where the locality was one over which admiralty had jurisdiction, all torts occurring there were cognizable in admiralty, whatever their nature. The incongruities of this rule were hinted at by at least one learned text writer,[1] and finally Judge Ross in this circuit, evidently affected by the same considerations, held in Campbell v. Hackfield & Co.,[2] that locality was not alone determinative, but that the tort in question must also be maritime in nature. Subsequently, the Supreme Court, without repudiating but rather reaffirming the locality test, recognized this case without criticism,[3] and later,[4] in a case where there was no doubt as to the sufficiency of the locality, took the trouble also to find that the tort in question was maritime in nature. Yet notwithstanding this tacit recognition that locality alone might not be determinative, Judge Gilbert has said: "In cases of tort the jurisdiction in admiralty depends entirely upon locality. There can be no other test."[5]

The result is an unsatisfactory one, particularly in this Circuit, which gave birth not only to the Hackfield case, but also to the later contradictory dictum of Judge Gilbert. The recognition of the Hackfield doctrine by the Supreme Court is not sufficiently clear-cut to be controlling. What is to happen next? Is the law in a state of transition to a more reasonable view, or has error, that is waiting to be dispelled, crept in? Those who are interested in this problem will find reason for reflection in two recent cases in the lower federal courts. In the most recent of these[6] it was held that admiralty had jurisdiction of an injury by a ship to a submarine cable. The tort, being due to improper navigation, was maritime in nature, but what of the locality? The cable was in the water, but was apparently supported on the bottom, and was not an aid to navigation.[7] The locality test, as strictly laid down in a somewhat similar early federal case,[8] was undoubtedly not so closely observed. In fact, the case shows a decided tendency to base jurisdiction rather on the nature of the tort than on the locality of its occurrence, thereby analogizing the test of jurisdiction to that obtaining as to contracts.[9]

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[1] See Benedict, Admiralty Practice (4th ed.), § 231.

[2] (1903), 125 Fed. 696 (C. C. A., Ninth Circuit).

[3] The Blackheath (1904), 195 U. S. 361, 49 L. Ed. 236, 25 Sup. Ct. Rep. 46.

[4] Atlantic Transport Co. v. Imbrovek (1914), 234 U. S. 52, 58 L. Ed. 1208, 34 Sup. Ct. Rep. 733.

[5] California-Atlantic S. S. Co. v. Central Door and Lumber Co. (1913), 206 Fed. 5 (C. C. A., Ninth Circuit).

[6] United States v. North German Lloyd (1917), 239 Fed. 587 (Dist. Ct., S. D. N. Y.). See also Postal Telegraph Cable Co. v. P. Sanford Ross, Inc. (1915), 221 Fed. 105 (Dist. Ct., E. D. N. Y.).

[7] Cf. The Blackheath, supra, n. 3; The Raithmoor (1916), 241 U. S. 166, 60 L. Ed. 937, 36 Sup. Ct. Rep. 514.

[8] The Maud Webster (1876, 1877), 8 Ben. 547, 16 Fed. Cas. No. 9302.

[9] See New England, etc. Ins. Co. v. Dunham (1870), 11 Wall. 1, 20 L. Ed. 90.

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Though this test is perhaps vague, and if ultimately adopted means the repudiation of a host of earlier cases, it is certainly more reasonable, for it gives admiralty courts jurisdiction in all cases of which they may be said to have expert knowledge, namely, those in which the transaction is maritime in its nature and concerns sea affairs.

Another manifestation of this same tendency may be observed in another recent federal case,[10] where it was held that an admiralty court had jurisdiction of a petition to limit liability for a tort clearly maritime in nature, whether or not it answered to the locality test. The court did not base its right to hear the petition wholly on the interstate commerce clause but also on that clause in the Constitution containing the grant of admiralty jurisdiction.[11] The court regarded the damage by the vessel in question as falling within the scope of the legislative power of Congress under this clause,[12] and must therefore have considered that such power extended to all tortious transactions maritime in nature, irrespective of locality. The decision in *United States v. North German Lloyd* would seem to agree with *Postal Telegraph Cable Company v. P. Sanford Ross, Incorporated.*[13]

A. T. W.

CONSTITUTIONAL LAW: POLICE POWER: EMPLOYMENT AGENCIES.—The mode and character of argument adopted by Mr. Justice Brandeis in his dissenting opinion in *Adams v. Tanner,*[1] as applied to a judicial opinion, are almost revolutionary. The majority opinion, written by Mr. Justice McReynolds, on the other hand, is worked out in accordance with the cut-and-dried conventions of the profession. The virtue of Mr. Justice Brandeis' method of attack has become more or less familiar to students of constitutional law through the briefs on Shorter Hours for Women,[2] The Shorter Work Day,[3] and the Oregon Minimum Wage Cases.[4] The first of these briefs was written by Mr. Brandeis himself, as counsel for Oregon, and it blazed the way for new order of legal brief. The first argument in the third of the above mentioned briefs was also prepared by Mr. Brandeis before his nomination as Associate Justice of the Supreme Court, while the completion of that brief and the preparation of the second were performed by Professor Felix Frankfurter and Miss Josephine Goldmark, the Publication Secretary of the National Consumers' League.

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[10] The Steam Dredge No. 6 (1915), 222 Fed. 576 (Dist. Ct., S. D. N. Y.).

[11] U. S. Const., Art. III, § 2.

[12] Cf. In re Garnett (1891), 141 U. S. 1, 35 L. Ed. 631, 11 Sup. Ct. Rep. 840.

[13] See supra, n. 6.

[1] (June 11, 1917), 37 Sup. Ct. Rep. 662.

[2] Muller v. Oregon (1908), 208 U. S. 412, 52 L. Ed. 551, 28 Sup. Ct. Rep. 324.

[3] Bunting v. Oregon (1917), 243 U. S. 426, 37 Sup. Ct. Rep. 435.

[4] Stettler v. O'Hara (April 9, 1917), 37 Sup. Ct. Rep. 475.

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The law giving rise to the case of *Adams v. Tanner* was an initiative measure of the State of Washington, adopted by popular vote in November, 1914. It prohibited employment agencies from collecting fees from workers seeking employment. The law had been sustained by the Supreme Court of Washington,[5] and by the Federal District Court.[6] Its validity was contested mainly on the ground that the plaintiffs, who were proprietors of private employment agencies in the city of Spokane, would be compelled by the enforcement of the law to discontinue their business and would thereby be deprived of their liberty and property without due process of law.

The majority of the court (Justices McReynolds, Day, Van Devanter, Pitney, and Chief Justice White) held the act invalid as in excess of the police power of the state and in violation of the Fourteenth Amendment. Mr. Justice Brandeis dissented, and Justices Holmes and Clarke concurred with him. Mr. Justice McKenna expressed his dissent, also, in a very brief separate opinion. The character of the argument used in Mr. Justice Brandeis' opinion seems so clearly to vindicate the new spirit of rational approach in dealing with questions of social legislation as to distinguish it as a landmark in constitutional interpretation.

All the court would agree that action by the legislature is final unless the measure adopted is clearly arbitrary or unreasonable, or has no substantial relation to the object sought to be attained.[7] But the method of reasoning is quite different in the two opinions. The majority opinion proceeds from the principle of the right of the individual to pursue any customary, useful and lawful business, and comes to the conclusion that the act in question is an arbitrary and oppressive interference with such a business. The minority opinion, starting from the principle of the power of the commonwealth to control the public welfare, states its criterion of deciding the question in the following words: "Whether a measure relating to the public welfare is arbitrary or unreasonable, whether it has no substantial relation to the end proposed, is obviously not to be determined by assumptions or by *a priori* reasoning. The judgment shall be based upon a consideration of relevant facts, actual or possible. *Ex facto jus oritur.* That ancient rule must prevail in order that we may have a living system of law." The opinion then proceeds to expose and discuss the relevant facts under the four heads: 1. The evils. 2. The remedies. 3. Conditions in the State of Washington. 4. The fundamental problem. In the

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[5] Huntworth v. Tanner (1915), 87 Wash. 670, 152 Pac. 523; State v. Rossman (Wash. Dec. 5, 1916), 161 Pac. 349.

[6] Wiseman v. Tanner (1914), 221 Fed. 694.

[7] Booth v. Illinois (1902), 184 U. S 425, 46 L. Ed. 623, 22 Sup. Ct. Rep. 425; Otis v. Parker (1903), 187 U. S. 606, 47 L. Ed. 323, 23 Sup. Ct. Rep. 168.

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determination of the social, economic and industrial questions involved, the opinion has recourse to the authority of social, economic and industrial experts. From an examination of these sources it readily comes to the conclusions that private employment agencies have been held to be instruments of grievous injustice; that the remedies of indirect regulation practiced by some twenty-four states of the Union have been found unsatisfactory, the best expert opinion favoring the total abolition of private labor agencies; that the peculiar needs in the State of Washington emphasized the defects of private employment offices; and that the fundamental problem was the chronic one of unemployment, and that, while this is perhaps the gravest and most difficult problem of modern industry, the best informed authorities agree that the establishment of an adequate system of employment offices or labor exchanges is the indispensable first step toward the solution of the problem.

Granting the soundness of the facts and arguments adduced, the opinion seemed necessarily driven to the conclusion that the attempt on the part of the State of Washington by the act in question to overcome industrial maladjustment and unemployment must be upheld as within the sphere of the state's police power. As the court said, the law was to be sustained as being similar in kind to a workmen's compensation act, which throws the financial burden of industrial accidents upon the employer.[8]

W. C. J.

EVIDENCE: CONFESSIONS: ADMISSIBILITY FOR COURT OR JURY.—The Anglo-American method of trying cases before a divided tribunal, the judge and jury, raises difficult questions as to their respective duties. The court passes upon most disputed questions of fact except the ultimate issues,[1] and sometimes passes provisionally upon ultimate issues and the more important evidentiary matters. In determining whether the original of a document has been lost for the purpose of admitting secondary evidence, the court passes upon that question once and for all. If the copy is admitted, the jury must receive it whether it believes the original was lost or not. On the other hand, in admitting the declarations of an alleged agent, ordinarily there must first be proof of agency. All the court passes on in this case is whether there has been sufficient evidence presented from which reasonable men might find the existence of agency. The jurors should be instructed to disregard the declarations unless they believe agency has been proved.[2] The competency of a witness is passed on by the court without reference to the jury, but as the jurors are the

[8] Mountain Timber Co. v. Washington (1917), 243 U. S. 219, 37 Sup. Ct. Rep. 260.

[1] Thayer, Preliminary Treatise on Evidence, p. 248.

[2] Corpus Juris, Vol. 2, p. 940.

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sole judges of the credibility of the witness, his testimony may be disregarded on any ground including his lack of competency.

What, then, is the situation in regard to confessions? The orthodox theory, still prevailing in many jurisdictions, is that the court decides whether a confession is voluntary and admissible, although the jury in passing on the credibility of the witnesses may disbelieve the confession. Also, the jurors may believe, contrary to the opinion of the court, that improper inducements, as for instance the promise of a light sentence, have been used to obtain the confession. Yet they may, nevertheless, believe the confession to be true, and find accordingly.[3] This view was expressed in the California courts in an extreme case in which it was held that the failure of the defendant to offer evidence to the court that the confession was involuntary, precluded him from offering the same proofs to the jury when presenting his own case in chief.[4] This was plainly wrong under any view, for the defendant should have a right to have all questions affecting the credibility of the witnesses decided by the jury and he ought not to be compelled to put in his case before the prosecution has completed its evidence. The defendant may of course take the stand or offer other evidence when the prosecution first introduces the confession, and before its case has been closed. This also becomes matter for the jury to consider if the jury has not been withdrawn,[5] which it really ought to be if the spirit of the confession rule is to be observed.[6]

By a second theory the court simply passes on the question whether there is some evidence to show that the confession was voluntary. If there is, the whole matter goes to the jury under appropriate instructions. This is an abrogation by the court of a part of its judicial functions, a somewhat lazy method of avoiding a decision where the evidence is conflicting, by passing it up to the jury. This procedure has been criticized as taking from the defendant his right to a ruling by the court on the question of the admissibility of the confession.[7]

The third theory is the one approved by the Supreme Court of California. The court must hear evidence preliminary to the admission of the confession and decide whether or not the confession is in fact voluntary. This decision is not final, however, for the whole matter is submitted to the jury under appropriate instructions that unless the jury finds the facts necessary to constitute the confession legally admissible, the confession should be

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[3] Wigmore on Evidence, § 861, and see § 1451.

[4] People v. Cahill (1909), 11 Cal. App. 685, 106 Pac. 115.

[5] People v. Luis (1910), 158 Cal. 185, 110 Pac. 580.

[6] Chamberlayne on Evidence, § 1587, but see People v. Brasch (1908), 193 N. Y. 46, 85 N. E. 809.

[7] State v. Duncan (1876), 64 Mo. 262.

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disregarded.[8] This is the view of the Supreme Court in *People v. Sweetman*,[9] where approval has been withheld from the dictum of the District Court of Appeal in the same case.[10] The latter court considered it error to instruct the jury that a confession must be disregarded if believed to be made under promise of reward, menace, duress, or fear of punishment. There is a certain logical accuracy in the theory of the Supreme Court but it complicates the matter before the jury by necessitating instructions on the technical and artificial law of confessions, difficult for the jury to understand, instructions that will in all probability be disregarded. The view of the Supreme Court is also unnecessary for the protection of the defendant because he is safeguarded by the court whose duty it is to exclude confessions not shown to be voluntary. The effect of the ruling of the Supreme Court is to give the defendant two chances to avoid his confession, two trials of the same issue. The case, however, is an illustration of the tendency in the law to pass up to the jury all disputed questions of fact whenever possible, especially where the question, while not necessarily the ultimate issue in the case, is nevertheless so strongly probative as to be really decisive.

A. M. K.

LIS PENDENS: PURCHASER PENDENTE LITE.—The rights of a purchaser of specific property which is the subject matter of litigation at the time of the purchase have been fully discussed by the courts in this country and in England. By statute in this state the doctrine of "lis pendens" may become operative in cases involving the title and possession of real property.[1] The question whether the doubtful common law doctrine "that all Her Majesty's subjects are bound to take cognizance, at their own peril, of what is passing in Her Majesty's Courts of Justice with reference to specific property"[2] applies to personal property has not been settled in the United States by unanimity of opinion.[3] In California the Supreme Court in *MacDermot v. Hayes*[4] decided that a purchaser of shares of corporate stock during the pendency of an action to have the stock declared the subject of a trust, who took

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[8] People v. Thomson (1905), 145 Cal. 717, 79 Pac. 435, a case of a dying declaration which involves the same principle as confessions. The language in People v. Oliveria (1899), 127 Cal. 376, 59 Pac. 772, that the jurors are the sole judges of credibility, might be construed otherwise, but was probably not so intended. See also People v. Profumo (1913), 23 Cal. App. 376, 138 Pac. 109.

[9] (April 2, 1917), 53 Cal. Dec. 459, 164 Pac. 627, 628; People v. Gibson (1915), 28 Cal. App. 334, 152 Pac. 316, in which the court held that the admissibility of the confession is a question to be determined solely by the court must also be considered as overruled.

[10] (Feb. 1, 1917), 24 Cal. App. Dec. 234.

[1] Cal. Code Civ. Proc., § 409.

[2] Chitty, J., in Wigrain v. Buckley, 1894, 3 Ch. Div. 483, 488.

[3] 21 Am. & Eng. Encyc. of Law 626, 25 Cyc. 1453.

[4] (May 9, 1917), 53 Cal. Dec. 586, 594.

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without actual notice of the litigation was not charged with constructive notice. This follows the English rule that the doctrine of "lis pendens" does not apply to personal property.[5]

The English doctrine as finally announced was based largely on the conveniences of trade and the convenience of bankers who dealt in negotiable securities. Aside from this basis of convenience there has been a vigorous controversy, as to the nature of the doctrine of "lis pendens." One line of authorities, led by Bellamy v. Sabine,[6] contends that it was a doctrine of common law and equity resting on the foundation that it would be impossible to terminate litigation successfully "if alienations pendente lite were permitted to prevail." The other line of authorities following Murray v. Ballou[7] explains it upon the equitable doctrine of constructive notice. These doctrines have often been discussed and reviewed.[8] The first class of cases seems to go back to the so-called real actions of the common law, in which the judgment finally settled all rights to the thing which was the subject matter of the action. Strictly speaking, every action which has for its subject matter a specific thing real or personal, and which has for its purpose an adjudication which will extinguish, transfer or alter a right, title, interest or status, may be considered a proceeding in rem.[9] Following this view, or taking up the doctrine of constructive notice, which the Supreme Court of California in the case under discussion eliminated by construing Section 1908, subd. 2 of the Code of Civil Procedure, may it not be suggested that the English view of convenience goes too far in declaring that personal property should not be made subject to the doctrine of "lis pendens"? Negotiable instruments and securities from their very nature should be excluded.[10] But why, in a state like California, should we not amend the statute on "lis pendens"[11] to include chattels and personal property considered in equity as of peculiar value, and also personal property held subject to an express trust? It might also cover other equitable proceedings, such as bills for rescission, cancellation, and reformation. The statute in claim and delivery,[12] although it does in a manner relieve against hardships, is not sufficient. Injunction is often resorted to, but it binds merely the defendant. Creditor's bills and insolvency and bankruptcy proceedings usually operate so as to charge purchasers with notice without causing undue

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[5] Wigrain v. Buckley, supra, n. 2.
[6] (1857), 1 De G. & J. 566, 44 Eng. Rep. R. 842, 849.
[7] (1815), 1 Johns. Ch. (N. Y.) 566.
[8] 20 Harvard Law Review, 488; 7 Columbia Law Review, 282. See also 16 Harvard Law Review, 225; 22 Harvard Law Review, 455; 12 Columbia Law Review, 82. Bispham, Principles of Equity (8th ed.), § 274.
[9] Street, Foundations of Legal Liability, Vol. III, Chap. IV.
[10] County of Warren v. Marcy (1877), 97 U. S. 96, 105, 24 L. Ed. 977.
[11] See n. 1, supra.
[12] Cal. Code Civ. Proc., § 509, et seq.

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inconvenience to business.[13] Recorded notices of pending divorce proceedings have been held not to bind the property of the husband.[14] The whole problem of constructive notice could be more scientifically covered than it is by our present statutes.

M. C. L.

MUNICIPAL CORPORATIONS: "MUNICIPAL AFFAIRS" UNDER THE CALIFORNIA CONSTITUTION.—The Supreme Court, speaking through Chief Justice Morrison, in 1880, said with reference to the privisions of the Constitution of 1879 relating to municipal corporations: "It is manifestly the intention of the Constitution to emancipate municipal governments from the authority and control formerly exercised over them by the legislature."[1] The intention, however, of the constitutional provisions establishing a home rule regime of municipal government, was thwarted by the interpretation given by the Supreme Court in a series of cases.[2] In order to correct this interpretation of the Constitution, section 6 of Article XI was amended in 1896 by the insertion of the words "except in municipal affairs", making the latter portion of the last sentence read: "and cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, except in municipal affairs, shall be subject to and controlled by general laws."

If control over municipal affairs was intended by the amendment of 1896 to be given to cities automatically, by very force of their incorporation, this intent was again held by the Supreme Court not to have been expressed. Instead of that result the Court held that in order for any particular municipal affair to be within the authority of the city or town and beyond nullification by the legislature, such particular municipal affair must have been claimed in the charter: "every city in the state is subject to and controlled by general laws relating to municipal affairs, unless, by virtue of some provision of the Charter under which is exists and is acting, such municipal affairs may be engaged in and performed by it."[3] A final effort was made in 1914 to amend section 6, and also section 8, of Article XI, so as to give all cities having freeholder charters the power to exercise, as a matter of course, all strictly municipal functions without going to the pains of making any enumeration thereof in their several charters. The wording of section 6, under amend-

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[13] 21 Am. & Eng. Encyc. of Law, 642.

[14] Sun Insurance Co. v. White (1898), 123 Cal. 196, 55 Pac. 902; Mayberry v. Whittier (1904), 144 Cal. 322, 78 Pac. 16. Cf. 29 Ann. Cas. 1913 D, 950. (note).

[1] People v. Hoge (1880), 55 Cal. 612.

[2] Staude v. Election Commissioners (1882), 61 Cal. 313; Thomason v. Ashworth (1887), 73 Cal. 73, 14 Pac. 615; People v. Henshaw (1888), 76 Cal. 436, 18 Pac. 415; Ex parte Ah You (1890), 82 Cal. 339, 22 Pac. 929; Davies v. City of Los Angeles (1890), 86 Cal. 37, 24 Pac. 771.

[3] Fragley v. Phelan (1899), 126 Cal. 383, 58 Pac. 923.

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ment of 1914, is as follows: "Cities and towns hereafter organized under charters framed and adopted by authority of this Constitution are hereby empowered, and cities and town heretofore organized by authority of this Constitution may amend their charters in the manner authorized by this Constitution so as to become likewise empowered hereunder, to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to and controlled by general laws." The wording of section 8 reads: "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

Happily the Supreme Court in the case of *Civic Center Association of Los Angeles v. Railroad Commission,*[4] seems to have given the interpretation to these provisions that was intended by their authors. The City of Los Angeles, by an amendment to its charter, ratified by the legislature, on January 16, 1917, brought itself within the operation of sections 6 and 8 as amended in 1914. The new provision in the Los Angeles charter reads: "51. To make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in this charter." "The result is," says the court, "that the city has become independent of general laws upon municipal affairs. Upon such affairs a general law is of no force with respect to Los Angeles." But the next sentence throws us into doubt: "If its charter gives it powers concerning them, it has those powers; if its charter is silent as to any such power, no general law confers it." We understand that no general law can confer power over a municipal affair in Los Angeles or other California cities similarly situated; but we do not understand the import of the words, "if its charter gives it powers concerning them (municipal affairs), it has those powers." That was so under section 6 as amended in 1896. If the court had said, "if its charter gives it power concerning them, it has such power," there would have been no ambiguity. It is to be hoped that this seeming ambiguity in the construction of sections 6 and 8 will not lead to error and further delay in reaching a result that has been striven for during almost forty years. The purpose of the Amendment of 1914 was to endow all cities thereafter adopting freehold charters with power over all possible municipal affairs, and to enable cities now existing under freeholder charters to enjoy like privileges by a simple amendment of their charters such as that recently adopted by Los Angeles.

W. C. J.

[4] (June 11, 1917), 53 Cal. Dec. 845.

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PROPERTY: RIGHTS OF LANDOWNER IN TREES ON HIGHWAY.—In *County of Santa Barbara v. More*[1] the defendant contended that a section of the Political Code of California,[2] which forbids, under a penalty, the destruction of shade or ornamental trees upon highways, could not be construed as depriving him of the right to cut trees, unquestionably his property by virtue of his ownership of the fee of the land whereon the trees were growing. It is of interest to observe that the Supreme Court in denying the defendant's position, rested the power of the legislature to control private property upon the very slight foundation of utility found in the fact the trees "add to the comfort of the traveler and lessen the expense of road maintenance." However, the court's opinion is noteworthy in its recognition that the "aesthetic value" of a fine avenue of trees "is by no means negligible." A New York court in 1871,[3] and a New Hampshire court in 1904,[4] thought that similar statutes could apply only to persons other than the owner of the trees. Difference in time and latitude may help to explain why the Eastern courts took views so divergent from that of the California court.

It is curious to notice that while courts still profess to disregard "aesthetic values" as interests demanding protection,[5] they are nevertheless with increasing frequency giving protection to such interests in circuitous and indirect ways.[6] Thus legislation against unsightly bill boards has been sustained on the ground of public safety in the matter of fire protection. In the famous Fifth Avenue Stage Coach Case, one of the grounds of decision was that the company was acting ultra vires its charter in permitting advertising signs in its omnibuses, and hence had no standing to enjoin the enforcement of an ordinance forbidding such advertising; another ground, less fantastic, was found in the fact that the municipality's power of control over the highway justified such legislation.[7] The principal case can, of course, be rested upon the power over the highways, and it is therefore not

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[1] (April 23, 1917), 53 Cal. Dec. 529.

[2] Cal. Pol. Code, § 2742.

[3] Village of Lancaster v. Richardson (1871), 4 Lans. 136.

[4] Bigelow v. Whitcomb (1904), 72 N. H. 473, 57 Atl. 680.

[5] C. M. Bufford, The Scope and Meaning of Police Power, 4 California Law Review, 279-280. See note to Thomas Cusack Co. v. Chicago, Ann. Cas. 1916 C 488, referring to other notes in the same series.

[6] Aesthetics and the Fourteenth Amendment, 29 Harvard Law Review, 860.

[7] Fifth Avenue Coach Co. v. City of New York (1911), 221 U. S. 467, 55 L. Ed. 815, 31 Sup. Ct. Rep. 709. It is worthy of note that ordinances which limit unpleasant occupations to certain non-residential districts have been sustained without direct reference to the public health and safety. Ex parte Hadacheck (1913), 165 Cal. 416, 132 Pac. 584; Hadacheck v. Sebastian (1915), 239 U. S. 394, 60 L. Ed. 348, 36 Sup. Ct. Rep. 143. It is difficult to reconcile such cases with the dictum in Varney v. Williams (1909), 155 Cal. 318, 100 Pac. 867, 132 Am. St. Rep. 88, 21 L. R. A. (N. S.) 741, to the effect that ordinances cannot be justified merely on aesthetic grounds.

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a precise authority to justify a statute seeking to impose the same limitations in respect to cutting down shade trees planted within the private property lines of the highway.

While it is probably true that no case in the United States has as yet gone quite to the extent of justifying an exercise of the regulation of private property solely in the interests of beauty, expressions are not lacking in numerous decisions recognizing that the law will ultimately take this step.[8] A great difficulty hitherto has been the want of proper administrative machinery in our law. A justice of the peace or a jury of farmers or merchants can scarcely be trusted to determine whether a structure is or is not unsightly. On the other hand, the American tradition, inherited from the days of the struggle between prerogative and common law, has been distinctly hostile to administrative boards, such as are indispensable for the proper carrying out of plans to secure beautiful surroundings. Moreover, statutes and ordinances have been too broadly expressed. For example, the Chicago ordinance which forbade advertising matter within a certain distance of public parks would have prevented an owner from placing a sale or rental notice on his house.[9] Even Berlin, which has gone beyond what any American community would endure in the matter of regulation of private property for advertising purposes, has carefully preserved the owner's or lessee's right to post or hang advertisements affecting his own interests.[10] There is little reason to doubt that when the material values inherent in more beautiful surroundings shall have been established by objective tests, such as have been used to justify the workmen's compensation, the eight hour day, and liquor legislation, the courts will be found quite ready to sustain reasonable legislation based wholly on aesthetic considerations.[11]

O. K. M.

WILLS: VALIDITY OF TYPEWRITTEN HOLOGRAPHIC INSTRUMENT. —Of the several interesting points raised recently concerning holographic wills, that in issue in *Estate of Dreyfus*[1] probes

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[8] A case which has gone far in this direction is Attorney General v. Williams (1899), 174 Mass. 476, 55 N. E. 77. See also, Wilbur Larremore, Public Aesthetics, 20 Harvard Law Review, 35; Ely, Property and Contract in their Relation to the Distribution of Wealth, ii, 783-784.

[9] Haller Sign Works v. Physical Culture Training School (1911), 249 Ill. 436, 94 N. E. 920.

[10] W. J. B. Byles, Foreign Law and the Control of Advertisements in Public Places, 7 Journal Society of Comparative Legislation (N. S.) 324-325.

[11] In addition to the authorities cited in the above notes, for recent discussions see Ernst Freund, Standards of American Legislation (1917), pp. 112-116; Henry T. Terry, The Constitutionality of Statutes Forbidding Advertising Signs on Property (1914), 24 Yale Law Journal, 1. Compare with the principal case, Altpeter v. Postal Cable Company (Feb. 17, 1917), 24 Cal. App. Dec. 274, 164 Pac. 35, with respect to property rights in trees upon highways.

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most deeply the true theory of the holograph. In that case the body of the will was typewritten; the Supreme Court held the instrument invalid, as not being "entirely written, dated and signed by the hand of the testator."[2] The court, admitting that it might be "by the hand of the testator", held that it was not "written" within the meaning of the code section, typewriting being "essentially a process of printing". The court is endeavoring to carry out the reason of the code section, which it considers to be the prevention of forged wills. No mention is made of the fact that the legislature at the same time provided that the words "writing" and "written" should include "printing" and "printed",[3] or that the same section reads today, "writing includes printing and typewriting."

The case appears to be unique in this country.[4] A case decided in Quebec,[5] under a statute similar to ours,[6] reaches a decision contrary to that in the principal case. The interpretation of the definition in the German Civil Code[7] however, which also is essentially the same as ours, agrees with the interpretation of the California court.[8]

It is always unsatisfactory to assume that the legislature could not have meant what it has said. Is it then necessary to hold that a will typewritten by the testator is not one written by him? There appear to be two theories as to the *raison d'être* of the holograph. One is that adopted in the principal case, namely the prevention of forgery. The other is the theory that the will must be the exclusively personal act of the testator in order that he may know directly every word that goes into the will and may avoid imposition upon himself at the time of its making.

Is a handwritten document so much harder to forge than a typewritten one? The court's assumption in the affirmative is not unanimously concurred in. The decision in the Aird case[9]

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[1] (June 9, 1917), 53 Cal. Dec. 803, 165 Pac. 941.

[2] Cal. Civ. Code, § 1277.

[3] Cal. Civ. Code, § 14, as originally enacted.

[4] There is no other case interpreting in this respect a code section similar to ours. In Arkansas and North Carolina the statute uses the word "handwriting," but the great majority of the legislative definitions do not directly prescribe the means of writing. The definition in the Code Napoleon (which is in fact considerably older than that compilation) has been substantially copied, not only in Louisiana and in this state, but also in Idaho, Montana and Nevada. Most of the other states allowing holographic wills provide that "unless wholly written by the testator" the will must be witnessed. The Tennessee statute uses the words "written by him" (testator) but later requires three witnesses to the "handwriting."

[5] In re Aird, 28 Que. Super. Ct. 235.

[6] Civil Code, § 850, the words being "wholly written and signed by the testator." There is also a provision that the words "written" etc. include the words "printed" etc. or "otherwise traced or copied." Civil Code 17, § 12.

[7] German Civil Code, § 2231.

[8] Note to § 2231, Chung Hui Wang's English translation. Note to same section, Bufnoir et al., Code Civil Allemand.

[9] Supra, n. 5.

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considers a typewritten forgery the harder of the two to execute successfully. Doubtless the microscope and the enlarging camera have made them both of great difficulty when submitted to modern scientific examination. But the ordinary will is not submitted to such examination; and there are plenty of rogues who can imitate a hand in a way to deceive the average witness familiar with the handwriting. It would seem that in the ordinary case, where experts are not called, the requirement of a handwritten document does not serve the purpose attributed to it by the court.

The second theory lays no weight upon the difficulty of proving the will to have been made by the testator. That is for the proponent to do if he can. As our definition is taken from the French law, we have open to us the body of French comment upon it. Much of this is consistent with the second theory only. Emphasis is constantly placed, not on the word "written", but on the word "entirely".[10] A host of wills sanctioned by the French commentators could not be proved from the handwriting, but only by a witness who saw the will written. A will written in the system of perforations employed by the blind is considered valid.[11] Nothing could be easier to forge, or harder to prove by the "handwriting". A will printed with a pen, as a child would do, is good. Neither paper nor ink is necessary. A writing scratched on glass with a diamond, written on a wall with a piece of coal, or on a slate with a stone, may be valid as a will, if proved to have been done entirely by the testator.[12] It must not be forgotten that it is the proponent of the will who must establish its genuineness. A holographic will may be proved by one who saw the writing executed, as well as by identification of the handwriting.[13] It could scarcely be contended that a will, conclusively proved to have been handwritten by the testator, would be invalidated by the fact that the writing did not resemble his usual hand. A disguised hand,[14] or one altered by physical weakness, is as much "written" and as much "by the hand of the testator" as one penned in the testator's accustomed handwriting.

In view of the above facts, it seems inexpedient to hold that the legislature, in providing that writing should include typewriting, did not mean the provision to apply to holographic wills.

A. R. R.

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[10] "Le testament olographe . . . . est l'oeuvre exclusivement personnele du testateur." Labori, Repertoire, s. v. "Testament," § 39.

"Quelle que soit l'écriture employée, il suffit qu'elle soit de la main du testateur." Beaudry-Lacantinerie, "Testament", Vol. 1, No. 1902.

[11] Beaudry-Lacantinerie, "Testament," Vol. 1, No. 1902. Also Huc, Vol. 1, No. 270.

[12] See generally on the subject of the French law, In re Aird, supra, n. 5.

[13] Cal. Code Civ. Proc. §§ 1309, 1940.

[14] The old case of Hannah v. Peake (1819), 2 Marsh. 133, holds valid a holographic will in a disguised hand, the court saying, "The requisition of the statute is not that the will shall be in the handwriting of the testator, but that it shall be written wholly by himself."

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Book Reviews

A TREATISE ON FEDERAL CRIMINAL LAW PROCEDURE. Second Edition. By William H. Atwell. T. H. Flood & Co., 214 W. Madison Street, Chicago, Ill. 1916. pp. 808. $6.50.

Most legal text books fall into one of two classes. In one class we find the book mechanically perfect, citations accurate, complete and uniform in style, showing professional proof-reading. The text is, however, as a rule also mechanical, giving the reader nothing more than he could get for himself by going to the digests, and giving the impression of having been written by shuffling cards containing the syllabi of the cases. In the other class we have books that are written by men who know something about the subject and want to put it on paper. The results rhetorically and typographically do not show the perfection of the professional legal text writer, but there is usually something of substance worth while that cannot be gained exclusively from the digests and cases. The book under review belongs to the latter class. Its author was formerly a United States district attorney and has evidently had considerable experience in federal criminal procedure. After three chapters of introduction on the United States Constitution, the general provisions applicable to the practice, and practical suggestions, the author takes up in detail the various crimes against the United States, the number of which we do not ordinarily realize. On big questions such as the Sherman Act, the privilege against crimination, conspiracy, etc., on which whole treatises could be written, the author does not claim to be exhaustive. The principal merit of the work is that it takes up each law, generally giving the text of the new Code, pointing out the difference, if any, between the Code and the former law, and giving the cases arising under the law, often with some comment. It is the discussion of the meaning of sections of the Code, and the possible questions which may arise, and their solution, that constitute the most valuable portion of the book. It is a good place to get practical questions treated practically. The old question of whether it is a crime to give a check for less than one dollar is answered decisively. There are interesting side-lights on federal criminal procedure as it is actually practiced. The author states as his experience that "While Federal prosecuting officers are not bounden by any rule or statute to permit a defendant or his witnesses to present their side of a question which is being investigated, yet the careful prosecutor, careful of the reputation of the citizen, often avails himself of the opportunity to permit the defendant to have his day before the grand jury." If all prosecuting officers observed this humane and sensible practice it would often obviate the necessity of a trial. The appendix contains some

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forms of indictment, the full text of the Federal Penal Code of Crimes, with a reference to all laws of a general nature which have penal provisions and are not contained in the Criminal Code. The work would be improved by a table of cases.

A. M. K.

SOME LEGAL PHASES OF CORPORATE FINANCING, RE-ORGANIZATION AND REGULATION. By Francis Lynde Stetson, James Byrne, Paul D. Cravath, George W. Wickersham, Gilbert H. Montague, George S. Coleman and William D. Guthrie. The Macmillan Company. New York City. 1917. pp. ix, 390. $2.75 net.

This book contains the material of a number of lectures delivered before the Association of the Bar of the City of New York in 1916, collected in seven topics. The first, by Mr. Stetson, relates to the financing of corporate enterprises by bond issues; the next four, by Messrs. Byrne, Cravath, Wickersham and Montague, relate to foreclosure and re-organization, and the effect of the Sherman Anti-Trust Law and Clayton Act upon this problem. The last two topics, by Messrs. Coleman and Guthrie, treat of Public Service Commissions, but almost wholly from the point of view of a New York practitioner, and are of less general interest.

Sooner or later nearly every lawyer has a problem in corporate re-organization, and whether the corporation involved be large or small, the question is at once a complicated and difficult one, toward the solution of which the ordinary text book on the law of corporations gives very little help. In the lectures of Messrs. Cravath and Byrne the lawyer so troubled will discover much that will be helpful by way of suggestion and precedent, but, of even greater value, he will also find the path of large re-organization, with all its pitfalls, so clearly and thoroughly described that he will undoubtedly have suggested to him many subjects to be covered in drafting re-organization papers that he otherwise might have overlooked. If his problem is further complicated by questions of monopoly, he will also find the same assistance in Mr. Wickersham's illuminating lecture on the Sherman Anti-Trust Law and, to a lesser degree, in Mr. Montague's timely discussion of the discursive, puzzling and little understood Clayton Act.

To those who are not face to face with such a problem, but who are interested in the financing and re-organization of large enterprises, the whole book will undoubtedly prove interesting, for though it is by diverse hands it is uniformly most readable. Perhaps the best thing of all is Mr. Cravath's discussion of the Boyd case.[1]

A. T. W.

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[1] See p. 191. Northern Pacific Railroad Co. v. Boyd (1913), 228 U. S. 482, 57 L. Ed. 931, 33 Sup. Ct. Rep. 554.

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STANDARDS OF AMERICAN LEGISLATION: AN ESTIMATE OF RESTRICTIVE AND CONSTRUCTIVE FACTORS. By Ernst Freund. The University of Chicago Press, Chicago, Ill. 1917. pp. xx, 327. Price $1.50 net. Postage extra. Weight 1 lb. 10 oz.

There are only a few pieces of writing in English which can at all be compared in the scope of their subject matter with this book—Ely's Property and Contract in its Relations with the Law, Dicey's Law and Public Opinion in England in the 19th Century, Pound's essays in the Harvard and other law reviews. Professor Freund, however, is a pioneer in the special juristic field which he subjects to examination under the critical analysis of the newer jurisprudence, and practically he is also a pioneer in the realistic and objective method with which he treats his material. The book is a constructive criticism of the system of judge-made law and an attempt to discover the principles which lie at the base of a science of legislation. The author comes to his task armed not only with a wide knowledge of dogmatic law, but also with a thorough understanding of the history and spirit of our legal institutions, a sound appreciation of the relations of jurisprudence to ethics, economics and other social sciences, and an easy familiarity with foreign legal systems and legislation.

One finds on almost every page original and profound suggestions, fertile with practical possibilities. But the author has not made a vain parade of foot notes or bibliographical paraphernalia. Mr. Freund might easily have supplemented his book with the usual trappings of scholarship; he might have added some thousands of words and called it a treatise rather than an essay; he might have announced that he was the founder of a new method in jurisprudence. He has chosen the more modest role of an essayist. Possibly the fact that he has foregone the advantage which the mere number of pages gives to literary effort may prevent his work from receiving the attention which its excellence demands. It is sincerely to be hoped that college and university teachers, as well as the legal and general reading public, will not neglect the treasures offered in this treatise.

It is impossible to do justice to a book of first-rate importance and quality in the brief space of a review. Whether the author is pointing out the "indifferent neutrality" of the common law with its "too much justice and too little policy," or is describing the "sentimental" value of the bill of rights; whether he is indicating necessary improvements in legislative procedure, or is analyzing the adjustment of opinion and economic needs as illustrated by the history of the banking laws in the various states; whether he is describing the powers by which moral conceptions or social ideals become crystallized in constitutional provisions or statutory enactments, or is demonstrating the fact that one of the chief reasons why courts have so frequently declared social legislation unconstitutional is because they were not convinced that the legislature acted upon evidence in making the law and because counsel

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in presenting such cases have usually failed to put the courts in possession of the facts which justified the legislation; whether he is criticizing English and American legal literature for its lack of an "objective estimate" of difficult legislative problems, or is attempting to suggest reasons for the strange developments of the common law of marital property,—one feels that justice can be done to Mr. Freund's work only by elaborate analysis and liberal quotation. The briefest review, however, demands that in estimating a book of this high quality, a few lines should be quoted that the reader may judge for himself the temper and spirit of the whole. Though it does not necessarily express the author's central aim any better than many others which might be quoted, it is believed that the following comparison of judge-made and legislative law is a characteristic passage: "The spirit of adjudication is after all a very different one from the spirit of legislation. Adjudication decides between contentions for the full measure of abstract rights carried to their logical conclusions, unaffected by the possible expediency of indulgence and concession, for courts deal with human relations in an atmosphere of controversy and extreme self-assertion; they touch life mainly at the point of abnormal disturbance. The function of legislation, on the other hand, is to prevent controversy, and is therefore dominated by the spirit of compromise and adjustment; it is for this reason that legislative rights are likely to be more qualified than common law rights. The result is that the principle of judicial rule or justice is the minimum, the principle of legislative rule or justice the maximum, of reciprocal concession. If so, judge-made law is ill suited for guiding legislation, and we should not look to the courts for the development of rules of legislative justice."

O. K. M.

TRADEMARKS AND TRADENAMES AND UNFAIR COMPETITION. Third Edition. By James Love Hopkins. The W. H. Anderson Company, Cincinnati, Ohio. 1917. pp. xcv. 1054. $10.00.

The twelve years that have elapsed since the publication of the second edition have witnessed a tremendous increase in the litigation on this subject, which has had the effect of settling points formerly doubtful and unsettling those formerly well established. For this reason it might perhaps have been better had the author recast the entire work instead of trying to fit the new matter into the old text. For example, section 14 on territorial limitation opens up with the sentence "Unlike a patent, a trademark knows no territorial limitation." At the end of the section, however, we come to the case of Hanover Star Milling Co. v. Metcalf[1] and find that no one knows the territorial limits of his trademark within the United States unless he has extended its use everywhere.

The discussion of the various topics is thoughtful and instruc-

[1] 240 U. S. 403, 60 L. Ed. 713, 36 Sup. Ct. Rep. 357.

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tive. The ethical development is clearly traced, whereby the law of unfair competition has enveloped the law of trademarks and enabled the court to prevent one man stealing the business of another, although that business has not been protected by a technical trademark, without doing violence to the law of trademarks by holding that to be a trademark, which is legally not subject to exclusive appropriation. It by no means follows that one should not be careful to select a valid trademark. The interesting list of trademarks held to be invalid, from A. C. A. cloth to Yale locks (Section 47), reveals much unnecessary litigation, due apparently to the failure of business men to take legal advice before adopting a trademark, and to the ignorance of lawyers in regard thereto. As the author says, for a valid trademark words of common right cannot be selected. "Thus, the word 'cracker' imprinted on a soda-cracker indicates merely that it is a soda-cracker. As the article itself conveys that knowledge, the word is superfluous. Mark the cracker 'Uneeda,' and an entirely different result follows. The word is a trademark." (Section 4). Unfortunately even this word did not satisfy the English courts, which found it a mere misspelling of ordinary words of common right.[2] Thus even the advice of the expert text writers fails when the courts make wrong decisions.

The author shows that the decisions are almost unanimous to the effect that a person cannot use even his own name with the fraudulent intent of taking business from another. Excepting in extreme cases, however, the injunction seldom takes the form of absolutely prohibiting the defendant from using his name in connection with the business, but merely requires a differentiation. L. E. Waterman Co. v. Modern Pen Co., 235 U. S. 88. The moral indignation with which Mr. Rogers in his book on Good Will, Trademarks and Unfair Trading, and Professor Wigmore in 10 Illinois Law Review 178, attack this doctrine is justified. One buying a Waterman pen or Baker's chocolate seldom knows anything about initials or label.

A. M. K.

[2] In re Uneeda Trademarks (1902), 1 Ch. 783, affirming (1901), 1 Ch. 550.

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